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THE

MONTHLY LAW REPORTER.

AUGUST, 1850.

THE CASE OF JAMES H. SUTLIFFE.[1]

In May, 1849, the prisoner was indicted in Charleston for arson. The indictment did not charge the burning of a *dwelling-house*, but simply a certain *house*, the property of one T. C. A verdict of guilty being rendered in the court below, the case was taken to the appellate court, and there the prisoner abandoned his appeal, and on being placed at the bar to receive sentence, prayed the benefit of clergy, which, after full argument and consideration, was allowed by the Court. From the opinions, which have been furnished us, it appears that the statutes 23 Henry VIII. c. 1, 25 Henry VIII. c. 3, and 4 and 5 P. & M. c. 4, are in force in South Carolina; and it was upon the construction given by the Court to these statutes, that the prayer of the prisoner was sustained. Two Judges (O'Neal and Wardlaw) delivered opinions, the former holding that the statutes Henry VIII. and P. & M. before referred to, applied only to *dwelling-houses*, or barns with grain or corn, and that the

[1] Sutliffe's case was tried at the February term of the Court of Appeals (Law) in South Carolina. The article published above is from a highly respected southern gentleman. The point of law discussed is a curious one, and one which we did not expect to hear about in this age of progress. Without in any way committing ourselves in the controversy, we are willing to give place to the article. We have also another one upon the same subject, for which we hope still to find room. It was prepared by a gentleman familiar with southern practice.

word *house* used in the indictment against the prisoner, was not, at this day, sufficiently definite in its meaning to exclude the idea of any *other house* than a dwelling-house. That as in criminal pleading nothing can be taken by intendment, the offence of which the prisoner was convicted was not necessarily brought within the operation of these statutes.

"If the burning of any other house," says the Judge, "than the dwelling-house, is an offence punishable at common law, (whether as a felony or a misdemeanor,) it is clear that the indictment to oust the prisoner of his clergy must distinguish between them. For the charge of burning a house would not, *ex vi termini*, mean a dwelling-house from which clergy is taken away by the statutes, 23 Henry VIII., c. 1; 25 Henry VIII., c. 3, and 4 & 5 P. & M. c. 4. It might mean the lesser offence."

Again:

"If there be a doubt whether clergy is taken away from the offence charged, the duty of the court is to give the criminal the benefit of that doubt. The word dwelling-house is now of a certain and definite meaning. It means the habitation of human beings, when they gather themselves together to converse, to rest, to shelter, to eat and to sleep. The wants of man have given him many other houses not necessarily parcel of his dwelling-house, such as his cotton-house, his workshop, his storehouse, his lumber-house, &c. It cannot be that the term house, which covers all these as well as a dwelling-house, is definite enough to exclude clergy. Nor will it do to say that the evidence must give it the character and sense of a dwelling-house. For if that were so, it would be constantly subject to a new meaning, to be obtained outside of the record."

The error, it will be seen, in this reasoning, consists in giving to a *legal* and *technical* term, its vulgar or common, although not its correct meaning: the word "house," according to the best English and American authority (Johnson and Webster), meaning not a "workshop," or a "cotton house," but the habitation of man. Conceding, however, the signification of the word to be as general and extensive as is supposed, the error is equally manifest. It is the legal signification, the meaning which the law attaches to the words used in the indictment, which is to govern, and not the sense in which the same words may be ordinarily understood. The legal idea of malice in murder and some other offences, may be different from the meaning of the

same word in common parlance. The "breaking" in burglary, and the "carrying away" in larceny, have each a more comprehensive meaning than is given to the same words in their usual and ordinary acceptation; and with all due deference we apprehend, that the true question for the consideration of the Court, was not what the word house was understood to mean at the present day, but the legal and technical meaning which the law attaches to that word when found in an indictment for arson.

We are inclined to think also, that the principle which gives to the prisoner the benefit of all *legal* doubts, is laid down more broadly than can be maintained. The word doubt in a legal sense applies to facts only; to the uncertainty which may pervade the mind in relation to the existence of a fact. Strictly speaking, the *law* admits of no doubt. Serious questions may, it is true, exist in the mind of the most learned Judge, as to the correctness of his conclusions. He may well entertain the gravest doubts as to the construction or meaning of particular statutes; and yet the obligation to declare the law, or expound the statute, is not the less imperative. The doctrine of doubts, it is believed, has no legitimate application except to the facts necessary to make out the offence; the ingredients necessary to constitute the legal guilt of the accused, and his true security as to the law which defines or governs the offence, is to be found, not in the doubts which may arise in the minds of his Judges as to its constitution, but rather in the correct application of those rules for the exposition of penal statutes which the wisdom and humanity of the law has incorporated with itself.

The opinion delivered by Justice Wardlaw is more elaborate, covering however substantially the same grounds as those occupied by Judge O'Neal, and arriving at the same conclusion, — that the indictment charging the prisoner with burning a *house only*, he was entitled to his clergy. The course of reasoning by which this result is obtained is sufficiently indicated by the following extracts from the opinion.

"Lord C. J. Coke says, 'note a diversity between the indictment of burglary and burning, for the indictment for burglary must say *domum mansionalem*, but so need not an indictment for burning, but *domum*, viz. a barn, or malthouse, or the like."

"If then *domus* has, since indictments were written in English, been correctly translated *house*, an indictment using *house* sufficiently charges a felony without the term *dwelling-house*, and judgment could not be advested for its insufficiency."

"All the precedents we have of indictments in English, that contain only the word *house*, were found after the Black Act passed, and by the introduction of its phrase, '*set fire to*,' show that they were framed under it, and with a view to the liberty of proving *any house*, which liberty its terms might be supposed to admit."

"Lord Coke does not expressly say that an indictment with *domus* only, is sufficient, as well to oust the benefit of clergy, as to establish a common law felony; but he had just before adverted to the statutes which took away the benefit from the burning of a dwelling-house or barn with corn in it, and in sanctioning the omission of *mansionalis* in the indictment, he cannot easily be supposed to have intended an exclusion from his general remark of the most important cases under the head he was treating of. In the report of Poulter's case, the indictment is not given, but from expressions there found, the conclusion seems just, that only *domus* was used, and that that case, which was greatly considered, was one in which, under such an indictment, judgment of death was pronounced, and executed long before the Black Act passed. It must have been held before the term of Lord Coke by positive adjudications (which seem to have been known to him, although his references do not point them out), that the term *dwelling-house*, used in the statutes of Henry VIII. and P. & M., was well expressed in an indictment for burning, by the word *domus*, although the same word would not serve the same purpose in an indictment for burglary. It is for us to say, whether now that the indictment and statutes are in the same language, the term *house* signifies exactly the same as *dwelling-house*." . . . "We must be clearly satisfied, not only that *house* embraces *dwelling-house*, but that it embraces nothing else, besides the very thing that the statutes designed to express by *dwelling-house*. *We can take nothing by intendment*," &c.

"Lord Coke in his chapter on burning houses, to which subsequent writers refer for authority, declares the burning of a barn not having hay or corn in it, nor being parcel of a mansion-house, not to be felony, and says that 'the offender is *not ousted of his clergy*, but where he burns some part of a mansion, or a barn with corn;' but does not expressly say that by the law, as it then stood, the felony of burning was confined to the mansion and its parcels, a barn with corn or hay, and a stack of corn. On the contrary he shows, by reference to ancient authors, that the common law felony extended to other burning." * * *

"The inference seems fair that, if the burning of a gin-house or other building not parcel of a mansion, is felony at common law, then that law

considers such a building to be a *house*, and the felony is sufficiently charged by an indictment which uses *house* only, or house, *to wit*, *a gin-house*, or the like; but that to oust the benefit of clergy, the indictment must show that the burning was one of those houses which the statute denying clergy particularly mentions. The appropriate meaning of house may be the habitation of man, but its more general sense as a covering or place of shelter, is too common to be altogether disregarded. Why was *dwelling* prefixed to house in the statute of Henry VIII., if house alone would have expressed the same meaning?"

The conclusion of course is, that the *domus* of arson before the 4 Geo. II., when the pleadings were in Latin, is not identical in meaning with the term *house*, as used in indictments for that offence, since the English forms have been introduced; and that the precedents in the law-books which use that term, are not in fact common law indictments, but were framed upon the Black Act of Geo. I., which is not in force in South Carolina.

The true distinction between the *domus* of arson, and the *domus mansionalis* of burglary, is perhaps at the present day more a matter of curious inquiry, than a subject of any practical importance. That there was originally a distinction, the use of the respective terms sufficiently imply; and the distinction becomes the more obvious, as the early history of the two offences is traced. Arson, in the time of Edward I., extended not only to the subjects of that offence as defined by the common law in the time of Coke, but extended generally, according to Fleta, ch. 36, to all buildings belonging to others "*alienos ædes;*" while the same author describes burglars as "those who in time of peace feloniously break churches or the *mansion-houses* of others, or the walls or gates of cities or boroughs. These offences were much more comprehensive during the reigns of Edward II. and Edward III., arson extending to almost every species of burning, as well of men and animals, as houses, and burglary consisting, not only of assaults upon the mansion, but upon the persons of those who were within. It was not until the time of Henry VII. that the former offence was confined to a dwelling and its parcels, a barn with grain or corn, and a stack of corn; and as to the latter, although there was some inclination even as late as Eliza-

beth, to extend the offence of burglary to other buildings than the mansion or dwelling-house, it was in the 26th year of that reign defined precisely as it now is, — "the breaking of a mansion in the night for the purpose of committing a felony." It is most probable that the Latin forms applicable to the burning of dwellings, and the breaking of mansions, were adopted by the crown lawyers, when the one was confined to the mansion proper, and those buildings which partook directly of its character; while the other extended not only to the mansion, but to all its appurtenances, the firing of which, as it was supposed, might endanger the principal dwelling. This distinction is indeed very clearly intimated both by Bacon and Blackstone. Thus, the former, under the title of "Burglary," says: "All out-buildings, as barns, stables, dairy-houses, &c. *adjoining* to a house, are to be looked upon as part thereof, and burglary may be committed in them; but if they be removed at any distance from the house, it seems that it has not been usual of late to proceed against offences therein as burglarious." So Blackstone, in relation to arson, says, "Not only the bare dwelling-house, but all outhouses that are parcel thereof, though not contiguous thereto, may be the subject of arson, and this by the common law." 4 Comm. 221. And the same author, as to burglary, uses this language: "And if the barn, stable, or warehouse, be parcel of the *mansion-house* and within the same common fence, though not under the same roof, or contiguous, a burglary may be committed therein, for the capital house protects and privileges all its appurtenants, if within the curteledge or homestall." Thus all outhouses, parcels of the dwelling, though not within the curteledge or homestall, are the subjects of arson, and are, as we think, appropriately included in the general term of "*domus*." Burglary, on the contrary, could not be committed in any building, which, although parcel of the mansion, did not partake directly of its character, either by being contiguous thereto, under the same roof, or within the same common fence; and hence the more restricted

term in indictments for this offence of "*domus mansionalis.*"

The inference of the Court, that because the statute 23 Hen. VIII. uses the term "dwelling-house," its framers must have intended to have excluded from its operation some species of common law house burning, cannot, we think, be sustained. It is opposed not only to the decision in *Poulter's case*, 11 Co. 39, but is equally at variance with the general character of the language used by Hale, Hawkins, Foster, &c. when speaking of this offence. Conceding the distinction taken by the Court to be correct, and the effect of the statutes of Henry VIII. and P. & M. would have been to divide the offence of house burning as it existed at the common law, into two grades, from the one of which clergy was taken, while it was demandable in the other. It need scarcely be remarked, that had such a distinction existed, it must have been familiar to the crown lawyers of that day, and certainly could not have escaped the notice of Coke, Hale, Hawkins, and Foster. The fact that no authority is or can be cited to sustain the position, that no English author has referred to such a distinction, is conclusive.

Equally erroneous is the intimation, that the term "house," as used in the Black Act, means more than "dwelling-house" in the stat. 23 Hen. VIII. The English Courts have decided directly the reverse, all the Judges holding, in *Brucene's case*, Leach, C. L. 195, that the Statute 9 George I., ch. 22, did "not vary the offence as it stood at common law," and Lord Ellenborough holding the same doctrine in *Hills* v. *The Hundred of Shrewsbury*, 3 East, Rep. 457. The words house and dwelling-house are used in the English statutes upon arson as synonymous expressions, and are used indiscriminately not only in these statutes, but by every English writer in relation to this offence. The statute 23 Henry VIII. uses "dwelling-house," 25 Henry VIII. "house." The 4 and 5 P. & M. the former, and 9 Geo. I. the latter. Chitty, in his form, gives "house," and in the marginal reference calls it "An indict-

ment for burning a dwelling-house." The statute of Victoria uses "house," and Archbold, in his form of an indictment framed upon it, "dwelling-house." The question as to whether the term *house*, in a common law indictment for arson, imported a *dwelling-house*, was expressly, by the Court of Appeals of Virginia, in the affirmative in *The Commonwealth* v. *Posey*, 4 Call, 109; and this case, the only American decision reported which has a direct bearing on the point, is passed by not only without comment, but without even the slightest notice by either of the Judges. Indeed, the whole reasoning of the Court appears not only loose and inconclusive, but artificial to the highest degree, savoring more of the advocate attempting to sustain the given side of a position, than of a Judge investigating for truth's sake alone.

We are opposed to the general and indiscriminate review of the opinions of judicial tribunals of respectable authority, but by no means subscribe to the doctrine that the decisions of our Courts are in every instance to be exempt from criticism. The exposure of grave errors, or the refutation of unsound reasoning, may in some cases be productive of much good to the profession, and not entirely without benefit to the bench itself. In the present case the escape of the prisoner is nothing; the adoption of the rule which has received the deliberate sanction of the Court, a matter of but little if of any practical importance. The real subject of complaint, is to be found in the abandonment, without good reason, of principles which have prevailed for centuries; in the relaxation of the wholesome strictness of the olden law without good cause. The maxim of "*stare decisis*," was never more necessary to be adhered to than in this day of innovation and change; and confusion and disorder can but be the tendency of every decision which, without sound reason, unsettles long and well established principles.

G.

Recent American Decisions.

Law Court of Appeals of South Carolina, February Term, 1850.

STATE v. JAMES H. SUTLIFFE.[1]

The Court of Appeals may give judgment after dismissal of an appeal, in a case of felony, and this although the appeal has been abandoned and the prisoner allowed the benefit of clergy.

Where the indictment charges the burning of a *house*, benefit of clergy is not taken away by statutes which take it from the burning of a *dwelling-house*, or barn having corn or grain in it.

THE opinion of the Court (which discloses the facts in the case) was delivered by

WARDLAW, J. — The prisoner was at May term last in Charleston before Judge Withers (who is now absent from this Court) indicted for "that he, &c. a certain *house* of one Thomas Corcoran there situate, feloniously, wilfully, and maliciously did *set fire to*, and the same house then and there by such firing as aforesaid, feloniously, wilfully, and maliciously did burn and consume against the peace and dignity of the same State aforesaid." A verdict of guilty was rendered after trial at the term aforesaid. An appeal was taken in behalf of the prisoner, and notice given to the Judge and Attorney General that a motion for new trial would be made in this Court. A report for this Court was made by Judge Withers, and delivered to the counsel of the prisoner. The case was here docketed by the prisoner's counsel, and at his request was marked "Appeal abandoned." The prisoner was placed at the bar, and it being here solemnly demanded of him, why sentence of death should not be pronounced against him, he first insisted that this Court has no further jurisdiction in the matter, but that he must be remanded to await the judgment of the Circuit Court at the next term; and secondly, he prays the benefit of clergy.

[1] We have thought it, upon the whole, necessary to a clear understanding of this case to publish the opinions, referred to in the preceding article, at length. — ED.

Full argument has been heard, and I am now to announce the opinion of the Court upon these two points.

I. * * * * * *

II. Is the prisoner entitled to benefit of clergy?

By the common law, clergy is demandable for any felony. Its demand must be grounded on some statute, and the indictment and evidence must expressly bring the case within the words of the statute.[1] When it has been taken by statute from an offence, which is felony at common law, the indictment need not conclude *contra formam statuti.* If the words of the indictment are tantamount in sense, and differ only in the form of expression from those used in the statute, the indictment is sufficient. It would be sufficient if the offence were *cont. form. stat.* So there is no difference between the strictness necessary in describing a statutory offence to bring it within the prohibition, and that necessary in describing a common law offence, from which benefit of clergy has been taken, to bring it within the denial. The Court must always be able, from inspection of the indictment and the verdict, to see the case, to which in awarding judgment it must apply the law, and it must see clearly, before it can be justified in declaring that the case is one in which the law has denied the benefit to which all felons are *primâ facie* entitled, and demands the solemn doom of death to be pronounced.[2] The Statutes 23 H. 8, c. 1, 25 H. 8, c. 3, and 4 and 5 P. & M. c. 4, are all in force here; that of Ed. 6, c. 12, never was.[3] So that the question so much discussed in *Poulter's Case*, and the commentaries thereon, does not at all arise in the case before us. There is no doubt here that the benefit of clergy has by statute been taken from the malicious and wilful burning of any *dwelling-house*, or barn then having corn or grain in it, belonging to another person. As to crimes of burning besides the

[1] Hawk. P. C. b. 2, c. 33, pp. 20-25.

[2] 2 Stat. 459. 463, 484.

[3] 11 Co. R. 29; 1 Hale, P. C. 232; 2 Ibid. P. C. 346; Foster's C. L. 330; 4 Call, Va. R. 109.

above-mentioned, we have of force the Stat. 37 H. 8, c. 6, against burning of frames,[1] and the Stat. 22 and 23 Ch. 2, c. 27, against the burning of any stack, house, building, or kiln, maliciously in the night time; but not the Stat. 9 Geo. 1, c. 22, (commonly called the Black Act), which, amongst other acts of malicious mischief made capital, includes the *setting fire to any house*, barn, outhouse, wood, stack, &c., nor any similar statute. It has been argued in this case, that long ago it was settled and ever since has been held, that in an indictment for felonious arson, the word *house* without *dwelling*, is sufficient; that to constitute the crime at common law, the burning must be of a dwelling-house, or parcel thereof (except the case of a barn, for which there must be special allegations and circumstances); and that by a verdict finding the prisoner guilty of the felony charged in the indictment, this Court is informed that his guilt of burning a dwelling-house has been established: for that it must be presumed that proper instructions were given to the jury, and that under those instructions the evidence was found to show that the burning was of an inhabited building, or of some of the buildings which are parcel of a dwelling-house — all of those dwellings and something else being included in the term *house*, just as they are in the term *dwelling-house*.

Lord C. J. Coke says,[2] "Note a diversity between the indictment of burglary and burning, for the indictment of burglary must say *domum mansionalem*, but so need not the indictment of burning, but *domum*, viz., a barn, &c., malt-house, or the like." The *videlicet* and the *de* under it, here make some confusion; but the intention seems to be to declare, that the word *domum* in the indictment is alone sufficient, whether the burning was of the inhabited house or of any of those *outset* buildings, which (as had before been said) were, as well as the hall, parlor, lodging chambers, and other inset edifices, included in the mansion-house. Thus it is understood by Hale, Hawkins and the later writers on criminal law. If, then, *domus* has,

[1] 2 Stat. 477; Ibid. 521; 2 East, C. L. 1018. [2] 3 Inst. 67.

since indictments were written in English, been correctly translated *house*, an indictment using *house* sufficiently charges a felony without the term *dwelling-house*, and judgment could not be arrested for its insufficiency. Such an indictment is then different from one that should omit *maliciously*, or some necessary ingredient of the crime, and it will not do to say that such an omission as this might be established by sufficient evidence, and after verdict must be presumed to have been supplied, just as well as *dwelling-house* must be presumed to have been found under the allegation of *house* and proper instructions. The law which the writers that have followed Coke understood to have been laid down by him, is that *domus*, in an indictment for burning is, at common law, tantamount to *domus mansionalis*.

It must be observed, however, that on the same page Lord Coke shows that he understands *crematio domorum*, used in the Year Book, 3 H. 7, c. 10, to mean burning of houses of any kind;[1] that though he, in treating of burglary, was careful to use the words *edifices* and *buildings*, in reference to the inset and outset parcels of the mansion house, yet, in the chapter on burning, he speaks of the *inset* and *outset houses;* and that all the precedents which we have of indictments in English that contain only the word *house*, were framed after the Black Act passed, and by introduction of its phrase *set fire to*, show that they were framed under it, and with a view to the liberty of proving *any house*, which liberty its terms might be supposed to admit.

Lord Coke does not expressly say that an indictment with *domus* only is sufficient as well to oust the benefit of clergy, as to establish a common law felony; but he had just before adverted to the statutes which took away the benefit from the burning of a dwelling-house or barn with corn in it; and in sanctioning the omission of *mansionalis* in the indictment, he cannot easily be supposed to have intended an exclusion from his general remark of the most

[1] 3 Inst. 64.

important cases under the head he was treating of. In the report of *Poulter's Case* the indictment is not given, but from expressions there found the conclusion seems just that only *domus* was used, and that that case, which was greatly considered, was one in which, under such an indictment, judgment of death was pronounced and executed long before the Black Act was passed. It must have been held before the time of Lord Coke, by positive adjudications (which seem to have been known to him, although his references do not point them out) that the term *dwelling-house* used in the Statutes of H. 8 and P. & M., was well expressed, in an indictment for burning, by the word *domus*, although the same would not serve the same purpose in an indictment for burglary. It is for us to say whether now that the indictment and statutes are in the same language, the term *house* signifies exactly the same as *dwelling-house.* By establishing that the burning of a *house* is felony at common law, we are authorized to give judgment in the case before us, but to give judgment of death, we must be clearly satisfied not only that *house* embraces *dwelling-house*, but that it embraces nothing else besides the very thing that the statutes designed to express by *dwelling-house.* WE CAN TAKE NOTHING BY INTENDMENT, as was long ago said by the judges in holding that a full description of the offence of rape could not dispense with the word *rapuit* used by the statute of West. 2.[1] If there can be by common law no felonious burning of a house which is not a dwelling-house, then, perhaps, from the indictment and verdict here, a necessary inference arises that the prisoner has been found guilty of burning a dwelling-house; although even then, the inference must not be stronger than that held insufficient, when an indictment charging that the defendant "voluntarily, feloniously, and of his malice aforethought, slew" the deceased, could not avail because the word *murdravit*,[2] used in the statute, was not introduced.

It is not easy to ascertain how the felony of wilful

[1] Foster's C. L.

[2] Dyer, 304.

burning was, by the common law, limited and defined. Arson, by modern writers, is usually said to be an offence against the habitation, considered especially malignant and pernicious, because of the terror, confusion, and risk of life attending it, and because of the certain destruction of property which it occasions, and the immense desolation to which this may extend. So far, however, as either the motive of the offender, or the terrific and destructive consequences of his act may be regarded, the burning of a building not parcel of a mansion, may be in some instances an offence of greater enormity than in others would be the burning of some edifice connected with a dwelling. As, however, some precise rule seems to have been thought necessary, which would exclude acts not worse in motive or consequences than ordinary trespasses, and would include the usual cases of deep malignity and great devastation, it has been laid down that, to render the burning of a house felonious, it must appear to have been parcel of a mansion. "Not only the bare dwelling-house, but all outhouses that are parcels thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be subject to arson." [1]

"If a barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein." [2] Thus the description of the house which may be the subject of arson, is precisely the same as that of the house in which burglary may be committed, except that in the latter, the curtilage, homestall, or common fence is introduced. The omission in the former probably arose from what is after observed by writers, that nicety as to the subjects of arson is in England rendered unnecessary by the Black Act and subsequent statutes. Reference is continually made to the head of burglary for cases decisive as to arson; and if in the latter the mansion be extended beyond the curtilage, contiguity is indefinite, and we shall find no limit short of any edifice that is in

[1] 4 Bla. Com. 221. [2] Ib. 225.

any way used by an inhabitant of a neighboring dwelling. But agreeing as the writers on criminal law do, in the general explanation of what is meant by *house* in the definition given of arson — the malicious and wilful burning of the house of another — they all concur also that by common law, the burning of a barn filled with corn or hay,[1] though not parcel of a dwelling-house, was felony; and that so, also, was the burning of a stack of corn.

Lord Coke,[2] in his chapter on burning houses, to which subsequent writers refer for authority, declares the burning of a barn, not having corn or hay in it, nor being parcel of a mansion-house, not to be felony, and says that "the offender *is not ousted of his clergy*, but where he burns some part of a mansion, or a barn with corn;" but does not expressly say that by the law, as it then stood, the felony was confined to the mansion and its parcels, a barn with corn or hay, and a stack of corn. On the contrary, he shows, by reference to ancient authors, that the common law felony extended to other burning.

In 2 Inst. 188, in his exposition of the Statute of West. 1, c. 15, he cites the same authors,[3] and says, "Burning of houses, &c. was felony by the common law, as appeareth by this act and our ancient authors." The act which is said to be but a rehearsal of the common law, against offenders not entitled to bail, enumerates those taken *per arson* (burning generally) feloniously done, and it is *burning* without distinction, that Glanville classes amongst crimes punished capitally or with loss of member. The expressions used by some of the ancient authors cited, are ambiguous, as *crematio domorum* in the Year Book, *alienas ædes* in Fleta, *tectorum excisiones et incendia*[4] in the translation of the laws of Canute. Britton speaks only of

[1] Hawk. P. C. 10; Brit. fr. 16.

[2] 3 Inst. 67, c. 15.

[3] Saxon Laws, Athelstane, fo. 61; Canute, fo. 118; Bracton, 146; Britton, fo. 16; Fleta, lib. x. c. 35; Mirror, c. 1, § 8, c. 2, § 11, c. 3, § 12; Year Books, 3 H. 7, 10; 11 H. 7, 1; Glanville, lib. 146, lib. 1, c. 2.

[4] A late translation is "*irruptio in domum et incendium.*" The original Saxon, "*Hus brec and boernet*," seem naturally to be rendered *house breaking and burning*. Thus, house is, by philologists, derived from a root which means *to cover*.

grain and mansions, but the Mirror comprehends in the felony all burning of houses, or goods, done in time of peace feloniously for mischief or revenge. By the ancient common law, house burning seems to have been considered a species of hostile aggression, and was punished as *crimen laesæ magistates.*

A statute (8 Hen. 6, 16)[1] declared it, under some special circumstances of aggravation, high treason, and this statute, because of its retrospective operation, was held to be only in affirmance of the common law. Even before the Statute of Henry VIII., the Year Book, 11 Hen. VII. 1, shows that one was indicted for that he had feloniously, by night, burnt a barn, and because it was adjoining a mansion, this was held felony by the common law, and *he was hung.* It is impossible now to say when the ancient law on the subject assumed the form in which modern writers understand it to be presented by Lord Coke, or what influence statutes which never were of force here, may have had in moulding it to that form. A case in Plowden,[2] cited in 3 Inst. shows nothing material, and *Barham's Case*, like the case of *Lovel* v. *Hawthorn*, decides only that the words "he burnt my barn," were not actionable, because a barn *filled with corn or hay* could not be intended under the construction then adopted in slander of words *in mitiore sensu* — a construction which would have equally rendered the words harmless, because they did not necessarily impute a *malicious* burning. These cases, however, even more strongly than a single express decision in point, show the undoubting sense of the learned in the time of Queen Elizabeth, that the burning of an empty barn, not parcel of a mansion, was not felony; and confirmed as they have been by the concurrence of subsequent commentators, may well be opposed to any deductions now to be drawn from the writings of ancient authors. And yet if no distinction between an empty barn and other building, not parcel of a mansion, can be supposed to have grown out of the special

[1] 1 Hale, 571; 2 Hale, 346; Foster's C. L. 192.
[2] Plow. Com. 475; 4 Co. R. 20; Cro. Eliz. 839.

notice taken, both by the common law and the statutes, of a barn with certain articles in it, and if we look to the law of burglary for explanation of what shall be considered a parcel of the mansion, it is hard in this country of large farms and wide spaces, to adopt the law which would confine felonious arson to the buildings within the curtilage, and a barn outside having therein corn, grain, or hay. It is not burglary if the house entered be a vacant chamber in a building, of which other chambers are in the occupation of a tenant under lease; or if the house be a centre building, unoccupied, though the wings are dwelling-houses. Setting fire to such unoccupied parts of a building would fall under the Black Act; but that the partial destruction of those parts only, by malicious burning, would not have been felony at common law has not been resolved. These and similar questions have been excluded from consideration in England [1] by statutory provisions. Our law is strangely insufficient, if any building which it would not be burglary to enter, may be burnt without dread of punishments which await felony. And it would be as strangely inconsistent if, when the Stat. 37 Henry VIII.,[2] made of force here, punishes capitally the burning of any frame of timber prepared towards the making of any house, the burning of a house erected and once inhabited, but at the time of the offence unoccupied, should not be felonious. On the other hand, the inconsistency is not made less when the burning of the frame is capital, and the burning of the unoccupied house only a felony within benefit of clergy; and the Statutes 23 and 25 Henry VIII. would hardly be held, under the term *dwelling-house*, to take benefit of clergy from the burning of an unoccupied house.

It has been argued, that even if the burning of any building in use was a felony at common law, a building not parcel of a mansion must be described in the indictment by its peculiar designation, as a malthouse, cotton-house, and the like, and therefore that *house*, as used in

[1] 2 East, C. L. 1020.

[2] Stat. 477.

this indictment, can after verdict mean only *dwelling-house.*[1] There are English cases which hold *house* to be equivalent to *mansion house*, but those cases are under the statute of Geo. I. which has the words *any house* accompanied, that confine the signification of *house* there used, to a building inhabited, or designed for the habitation of man. If in the passage before quoted from 3 Inst., Lord Coke by the *&c.* following *barn* intended to mean (as from the preceding matter may be plausibly maintained,) *having corn in it, filled with hay, or the like, according to the circumstances to be shown by proof*, then he appears to have considered *domus* alone sufficient in all cases, whether the building burnt was parcel of the mansion, or was a barn not parcel of the mansion, but having such contents that the burning of it was felony. In Susannah Mintern's case, however, whilst the stat. 9 Geo. I.[2] was held to have done away all distinction between full barns and empty ones, and between day-time and night-time, it seemed to be the opinion of all the Judges that, supposing it to be necessary that there should be hay or corn in the barn, it must have been so stated, and no proof would supply the want of such statement. The inference seems fair that, if the burning of a gin-house or other building not parcel of a mansion, is felony at common law, then that law considers such a building to be a *house*, and the felony is sufficiently charged by an indictment which uses either *house* only, or house, *to wit*, *a gin-house*, or the like, but that to oust the benefit of clergy, the indictment must show that the burning was of one of those houses which the statute denying clergy particularly mentions. The appropriate meaning of house may be the habitation of man, but its more general sense, as a covering or place of shelter, is too common to be altogether disregarded. Why was *dwelling* prefixed to *house* in the statutes of Hen. VIII., if *house* alone would have expressed the same meaning? What has suggested that the specification was intended to distinguish between the

[1] 3 East, 460; 1 Leach, 261; Worth's case, 2 East, C. L. 102.
[2] 2 East, C. L. 1021.

actual apartment of abode and out-houses, such as, dove-cotes, dog-kennels, and cow-houses, which, although within the curtilage, may often be destroyed by fire without injury to the dwelling. For destruction of these, the higher penalty provided for security of the habitation, may have been thought no more proper, than for the destruction of other more valuable buildings, which are left with less protection, if the felony of arson extends only to the dwelling-house and buildings parcel thereof. A design to burn such out-houses may not always contemplate injury to the dwelling. Even where it may have done so, the accidental extinguishment of the fire before the dwelling was reached, may well make a difference in punishment, in like manner as a murderous battery is punished less than a murder; and in many other instances, a diversity in uncontrollable consequences widely separate acts which are similar in guilty intent.

It has been again suggested, that the purpose was to distinguish the burning of any parcel of a dwelling from that of any other house, all being included in the common law felony; or at any rate, the burning of any parcel of a mansion actually inhabited, from the burning of a house not inhabited, the common law felony embraces all houses intended for the habitation of man. This Court designs to do no more than decide the question before it. The observations which have been made are intended only to show what doubts rest upon this question. We cannot feel in construing the statutes of Hen. VIII., that influence of the Statute of 8 Hen. VI. (never of force here) and decisions under it, which may have affected opinions before the time of Lord Coke. We are not relieved by decisions made concerning the sufficiency of *domus* when the indictments were in Latin, or concerning the sufficiency of *house*, under the statute 9 Geo. I., from placing the words of this indictment, and those of the statutes which deny clergy, together, and inquiring whether they are the same, or clearly equivalent. Having no guide but the common law and the Statute of Hen. VIII., we cannot perceive with

that certainty that must be attained before the life of a fellow-creature be taken, that the offence described in this indictment is included in the denial of clergy made by those statutes.

The prayer for benefit of clergy is then allowed, and the sentence for felony within the benefit of clergy will now be pronounced. As that has been by our statutes made fine and imprisonment, the case of the prisoner is just as if he had been indicted and convicted of a misdemeanor, except that under the right of challenge he has enjoyed privileges which one accused of a misdemeanor is not entitled to, and that for a second offence he may hereafter lose the benefit now allowed to him.

O'Neal, J. That the offence charged "the burning of a house" is a clergyable felony, is I think perfectly clear. At common law, the burning of any house was, as I think, a felony. In Fleta it is said, "Si quis *ædes alieonos* nequitur, ob inimicitiam vel præde causa, tempore pacis, combusserit, et inde convictus fuerit per apellam, vel sine; capitali velut sententia punire." Seldon's Fleta, book 1st, chap. 37, p. 54. This sentence, translated into English, is: "If any one, wickedly, for enmity, or on account of spoil, shall have burned another's houses, and has been thence convicted, either by appeal or without, he ought to be punished by a capital sentence." This is a clear description of a common law felony. It is observable that in it the character of the houses burned does not seem to be regarded.

In his Institutes, part 3, chap. 15, C, Lord Coke tells us, "Burning is a felony by the common law, committed by any, that maliciously and voluntarily in the night or day, burneth *the house* of another." At D, he tells us what is "the house of another." "This is," he says, "not only intended of inset houses parcel of the mansion-house, but to the outset also, as barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like parcel of the mansion-house; but burning a barn, *being no parcel of a mansion-house, is no felony;* yet if there be corn or hay within,

the burning thereof is felony, though the barn be not parcel of a mansion-house. But the offender is not ousted of his clergy but when he burned some part of a mansion-house, or a barn with corn."

This authority is clear, that the burning of houses, other than the dwelling-house proper, is felony; indeed, I think, which are part and parcel, the usual incidents of a dwelling-house, and near enough to it to put it in danger if they be burned, are to be regarded as included under the general term dwelling-house, used in the statutes hereafter to be noticed. All the reasons apply to such houses as well as the dwelling. The same danger to life, the same invasion of the security of home and its comforts, are to be found in the one as well as the other.

Whether that be so or not, is perhaps not important now to inquire. Nor is it of any consequence whether the burning of an empty barn, not parcel of the mansion-house, be not felony. It is beyond all doubt a criminal offence, ranking as a felony or as a misdemeanor, to burn the house of another, and since the act making fine and imprisonment the punishment of a clergyable felony, there is no difference between such an offence and a misdemeanor, unless it be as to the consequence of a second offence. If the burning of any other house than a dwelling-house is an offence punishable at common law (whether the crime be a felony or a misdemeanor), it is clear that the indictment to oust the prisoner of his clergy must distinguish between them. For the charge of burning a house would not, *ex vi termini*, mean a *dwelling*-house, from which clergy is taken away by the Stats. 23 Hen. VIII., c. 1, s. 9; 25 Ib., c. 3, s. 3; and 4 and 5 P. & M., c. 4. It might mean the lesser offence. As I understand criminal pleading, the offence must be so charged, that the Court will know what judgment to give without resorting to any thing extrinsic of the indictment. The Statute 23 Hen. VIII., c. 1, s. 3, under which we are to pass, uses the word "dwelling-house." Any one convicted of burning a dwelling-house is deprived of his clergy. The Stat. 258, c. 3, s. 3,

which undertook to extend the Statute 23 Hen. VIII., c. 1, s. 3, to persons standing mute, &c., uses the word house in its enacting clause, although in the preamble it had used the word "dwelling-house." Taking the two together, and suppose they would receive the same construction, that is, that clergy was taken away from the burning of a dwelling-house; and this certainly becomes more plain, when the stat. 3 and 4 P. & M., c. 4, is referred to, which takes away clergy from accessories before the fact in burning a dwelling-house.

If there be a doubt whether clergy be taken away from the offence charged, the duty of the Court is to give the criminal the benefit of that doubt. The word dwelling-house is now of a certain and definite meaning. It means the habitation of human beings, when they gather themselves together to converse, to rest, to shelter, to eat and to sleep. The wants of man have given him many other houses not necessarily parcel of his dwelling, such as his cotton-house, his workshop, his store-house, his lumber-house, &c. It cannot be that the term house, which covers all this as well as a dwelling-house, is definite enough to exclude clergy. Nor will it do to say the evidence must give it the character and sense of a dwelling-house. For if that were so, it would be constantly subject to a new meaning, to be obtained outside of the record. I am therefore satisfied that the prisoner is entitled to his clergy. Another court having decided that the case is properly *here*, I have no doubt the Court can give the judgment which the Court below, under similar circumstances, would have given. *The State* v. *Witebury*, 2 Hill, 612; *The State* v. *Addington*, 2 Bail. 516; *The State* v. *Diveston*, 1 Bay, 377.

Supreme Judicial Court of Maine—Cumberland County—April Term, 1850.

JAMES DEERING, in Equity *v.* YORK AND CUMBERLAND RAILROAD COMPANY.

Whether an act of the legislature, incorporating a railroad corporation, and authorizing them to take and use land, before compensation is made to him, is so far unconstitutional and void.

An injunction is not the proper remedy in such case.

THIS was a bill in equity, praying for an injunction, to restrain the defendants from further entering upon, or using, the plaintiff's land, for the purpose of constructing the line of their road; more especially through that portion of his homestead farm, taken by the Company, and laying in the town of Westbrook.

The plaintiff, by his bill, sets forth, that his farm was valuable for purposes of cultivation, containing trees valuable for fruit and ornament; that the location of the railroad across it, would injure it for these purposes, — and would, if permitted to be used, by the laying down of the rails, and running of engines propelled by steam, constitute a nuisance.

He further contended, that the act establishing the Railroad Company which authorized the taking of land for the purposes of the road, was unconstitutional and void, under that provision of the Constitution of Maine, art. 1, sect. 21, which provides that "Private property shall not be taken for public uses, without just compensation, nor unless the public exigencies require it."

The act of July 30, 1846, sect. 1, establishing the York and Cumberland Railroad Company, contained the following provisions.

"And said corporation shall be and hereby are invested with all the powers, privileges and immunities, which are or may be necessary to carry into effect the purposes and objects of this act as herein set forth. And for this purpose said corporation shall have the right to purchase or *to take*

and hold so much of the land and other real estate of private persons and corporations, as may be necessary for the location, construction and convenient operation of said railroad; and they shall also have the right to take, remove and use for the construction and repair of said railroad and appurtenances, any earth, gravel, stone, timber or other materials, on or from the land so taken. *Provided, however*, that said land so taken shall not exceed six rods in width, except where greater width is necessary for the purpose of excavation or embankment; *and provided, also*, that in all cases, said corporation shall pay for such lands, estate or materials so taken and used, such price as they and the owner, or respective owners thereof, may mutually agree on; and in case said parties shall not otherwise agree, then said corporation shall pay such damages as shall be ascertained and determined by the county commissioners for the county where such land or other property may be situated, in the same manner and under the same conditions and limitations, as are by law provided in the case of damages by the laying out of highways. And the land so taken by said corporation shall be held as lands taken and appropriated for public highways."

"And no application to said commissioners to estimate said damages shall be sustained, unless made within three years from the time of taking such land or other property; and in case such railroad shall pass through any woodlands or forests, the said company shall have the right to fell or remove any trees standing therein, within four rods from such road, which by their liability to be blown down or from their natural falling, might obstruct or impair said railroad, by paying a just compensation therefor, to be recovered in the same manner as is provided for the recovery of other damages in this act. And furthermore, said corporation shall have all the powers, privileges and immunities, and be subject to all the duties and liabilities, provided and prescribed respecting railroads, in chap. 81 of the Revised Statutes, not inconsistent with the express provisions of this charter."

The plaintiff contended that this section furnished *no certain and adequate provision for the payment of damages, or compensation* for the property taken for the uses of said Company.

The plaintiff further contended, that, if the act was constitutional, it could be construed, as giving the right to take land only, on the condition, *that the property so taken should be previously paid for*, at such price as could be agreed upon; or such sum as should have been ascertained and awarded by the county commissioners, or by a jury, previous to any entry thereon, except for the mere purposes of survey and location.

The title of the plaintiff to the land in question, and the entry thereon by the defendants for the purpose of building their road, were admitted, for the purpose of the hearing, and it was further admitted, that no injury had been done to the plaintiff, beyond the mere taking of his land. No agreement for compensation had been made, nor had any proceedings been instituted by either party, for the purpose of ascertaining the value of the plaintiff's land so taken, at the time of filing the bill.

W. P. Fessenden, Esq., for the plaintiff.

J. A. Poore, Esq., for defendants.

The opinion of the Court was pronounced orally, by Wells, J.

The plaintiff, by his bill in equity, charges the defendants with having committed waste upon his lands, and the doing of certain acts upon the same, which are denominated in the bill a nuisance to him. He also prays for an injunction to restrain the defendants from doing any further acts upon his premises, by virtue of their charter.

The injunction is asked for, at the present time, without a hearing upon the general merits of the bill; and the defendants, without making an answer to the bill, admit, for the purposes of the hearing in relation to the injunction, that the facts stated in the bill are true.

It is contended by the plaintiff, that, if the act incorpo-

rating the defendants, allows them to take and use his land, before compensation is made to him, then the act is so far unconstitutional and void.

It is quite manifest that the act, by a fair construction of its language, does authorize the taking and using the land, before compensation is made; and in case the parties cannot agree upon the damages, they are to be determined by the county commissioners, in the same manner, and under the same conditions and limitations as are by law provided in the case of damages by the laying out of highways. The statute, chap. 81, sec. 6, directs, that when real estate is taken by a railroad corporation, the commissioners, upon the request of the owner of such real estate, to require the railroad corporation to give security to the satisfaction of the commissioners, for the payment of damages and costs which may be awarded by jury or otherwise; and it further provides, that the authority of the corporation to enter upon and use such real estate, except for making surveys, shall be suspended until the security is given. And the charter of the defendants confers all the rights, and subjects them to all the liabilities provided in chap. 81, before mentioned, not inconsistent with the provisions of the charter. Any party aggrieved by the doings of the commissioners, in estimating damages, may have a jury to determine the matter of his complaint, agreeably to chap. 25, sect. 8.

By the charter and provisions of the statute, the defendants may continue to use the real estate taken, by giving the required security.

By the constitution of this State, it is provided, art. 1, sect. 21, that "private property shall not be taken for public uses, without just compensation; nor unless the public exigencies require it."

The constitution does not prescribe that the compensation shall be made before the property is taken, nor when it shall be made. In times of war and civil commotion, the government may need the property of its citizens for public uses, when the emergency is so pressing that there

is neither opportunity nor means for making compensation at the time when it is taken. Lands are required for highways, turnpikes, canals and ferries, and the acts authorizing them to be taken, have uniformly, so far as they have come to our notice, provided for compensation *subsequently* to be made.

But it is conceded, in cases where the owner of the land has a claim upon a town or county for his damages, that there is then such a degree of certainty as will insure the eventual payment; and that it would not be in violation of the constitution, to show the property to be taken, where a public corporation would be liable for the compensation subsequently to be made. But even in those cases, the compensation would not be absolutely certain, for governments are subject to revolution, and they may fail of making payment, as all future earthly events are doubtful. If the payment is provided, though not absolutely certain, the law may still be constitutional. Can any thing more be required than a reasonable certainty of it?

The law does not prescribe the kind of security with which the commissioners may be satisfied. They may require a deposit of public stocks, and the securities of a town, city, state, or of the United States. But they may require security of a less satisfactory character, and it may entirely fail, and the owner be subject to great injury, though not to the ultimate loss of his land.

This is strictly a constitutional question, of great magnitude, not only affecting the plaintiff, but having an important bearing upon the interests of others. Before the injunction can be granted, we must decide the act, incorporating the defendants, to be unconstitutional and void, and this decision we are called upon to make, upon a mere interlocutory proceeding, without sufficient opportunity for examination and deliberation.

In the case of *Moor* v. *Veazie*, the plaintiff asked for an injunction, on the ground that the charter under which he acted was constitutional, and it was presumed to be so, so far as to authorize a temporary injunction. In that case,

the charter was claimed to be valid; there, we could grant what was asked, assuming the act to be in accordance with the constitution; here, we cannot do it without deciding the act to be in opposition to the constitution.

As we assumed, in that case, the constitutionality of the legislative act, so we must in this, so far as relates to the application for an injunction at the present time. The same rule which authorized it to be granted in that case, requires in this that it should be refused. We base our conclusion upon the rule, that an act of the legislature ought not to be decided unconstitutional, upon a preliminary hearing of this nature, before an examination of the general merits of the bill.

We therefore decline, at present, from expressing any opinion in relation to the validity of the defendants' charter. We have stated enough to show what the question is, and that it is one requiring very great consideration, and the most careful and attentive investigation. It must take the ordinary course of judicial proceedings, and will be decided, if the nature of the case requires it, upon the final disposition of the plaintiff's bill.

The injunction is denied.

Supreme Court of Pennsylvania. — Nisi Prius Term, at Philadelphia. — March 20, 1830.

KENNEDY *v.* WAY.

Though a party driving on a public road should lose all control of his horse, and an injury ensues in consequence, yet if the jury believe that the loss of control was the result of the defendant's prior fault, the plaintiff may recover.

Driving at the rate of fifteen miles an hour, or a mile in four minutes, on a public highway, is unlawful; and if death ensues from a collision thus produced, without fault of the injured party, the offence, it seems, would be murder in the second degree, unless accompanied with such circumstances of passion as to reduce the offence to manslaughter.

In an action of trespass against the master of a horse for a collision, it is for the latter to show that he was not in fault.

Where a collision occurs in a public road, if the jury believe the defendant was engaged at the time in a trial of speed with a third party, the jury may give exemplary damages.

Where the court charged the jury that they might give exemplary damages, which the jury declined to do, and found damages which the court thought much too small, the court, nevertheless, refused an application to grant a new trial, holding that the question of damages was one for the jury, with which the court could not meddle.

Two actions of trespass were brought, one by the plaintiff, and the other by the plaintiff's wife, for damages sustained by a collision in Broad Street. The plaintiff with his wife were in a wagon, and were struck by the defendant's wagon, which latter, at the time, was going at the rate of a mile in four minutes. There was some evidence to show that there was at the time a trial of speed between the defendant and a third person; but this was disputed by the defendant, who maintained that his horse had ran away with him, and that it was entirely out of his power to control it. The plaintiff's wagon was broken, and his wife thrown to the ground, though she sustained no material injury. It came out, incidentally, that Broad Street, between the Germantown Road and Green Hill, had become a sort of racing course for fast trotting horses, of which it was alleged the defendant's was one; and it appeared that in the afternoons the habit had become so settled as to expose passengers to much danger.

March 23, 1850. Judge Rogers, in charging the jury, said, that the case was very important to the defendant, and to the public, though the plaintiff had but little pecuniary interest in it, operated upon, as he seems to have been, by higher motives. The counsel had discharged their duty, and it now devolves upon the Court and jury to do theirs. There are two actions — one for injuries to Mr. K., the other for injuries to Mrs. K., and these two were necessary, and therefore Mr. K. is not obnoxious to censure on that account. It was alleged that these injuries were produced by the illegal, careless, and improper conduct of the defendant; and after reviewing the facts, the Judge continued: It is for the jury to say; How did the accident arise? Was it from the improper conduct of the defendant, or was it from causes over which the defendant had no control? and of this the burthen of proof is upon the defend-

ant, and it is for the jury to examine how far these excuses will avail him. If a horse runs away, without the fault of the driver, he is not answerable; but he must show he was not in fault. The Judge had here commented upon the testimony of the witness, with whom the plaintiff's counsel alleged Way was running at the time of the accident, and expressed his surprise at the neglect to call a witness who could have told all the particulars.

But (continued the Judge) admitting that a short time before this disaster, the defendant lost all command of his horse and could not stop him, yet if that was produced by the previous fault of defendant, he is responsible for all results directly or indirectly flowing from it. Driving at the rate of fifteen miles an hour, or a mile in four minutes, on a public highway, is dangerous, and in itself unlawful; a fast trotting horse is a pretty plaything, but it is expensive, and to be used in its proper place, but not for the public highway; the public are not to be endangered by lawless, dangerous, and improper sports, and where loss of life is occasioned by such, the offence is homicide, manslaughter, or murder of the second degree, both being subjects of penitentiary punishment. There are two questions, — first, Was the accident produced by defendant's improper conduct? On this (said the Judge) you can have but little difficulty, I think. Second, as to the amount of damages, the plaintiff ought to have ample compensation for all injury to himself and wife, and to his property. If the defendant was engaged in a trial of speed, the jury may give exemplary damages, large and heavy; and the Judge advised the jury to give such, as well to compensate the plaintiff as to punish the defendant. He has been fined $100 by Judge Parsons, and for this the jury may give credit if they think proper. If he was trying to stop his horse at the time, the damages should be mitigated. A great deal has been said about the plaintiff's motives; they do him no manner of discredit. Those who indulge in these things, should recollect that though it may be sport to them, it may be death to others.

The jury found a verdict of $75 for the plaintiff in each case.

A motion was made by the plaintiff for a new trial, which was submitted without argument by Mr. Phillips and Mr. Reed for the plaintiff, and Mr. Barton and Mr. Clarkson for the defendant.

March 30, 1850. Rogers, J. said he did not agree with the verdict. He thought the damages ought to have been heavier, and he was surprised at the result. The question of damages, however, was one for the jury, which he would not meddle with. It might have been that the jury considered the punishment in the Quarter Sessions as sufficient punishment. The case ought to be a warning to all persons who make a practice of fast driving in the public streets. If death had ensued in consequence of this collision, the perpetrator would have been held guilty of murder in the second degree, unless accompanied with such circumstances of passion as to reduce the offence to manslaughter.

Abstracts of Recent American Decisions.

Court of Appeals (Law) *of South Carolina. — January Term*, 1850, *at Charleston.*

Lewis v. *Brown.* — 1. A purchase by a sheriff, at his own sale, is void. 2. A levy made by a sheriff, not being legally carried out by the sale to himself, he may afterwards sell under it; and if he should even sell on a day not a sale day, and the owner does not make the objection, a third person cannot make it. 3. A person illegally divesting one of his possession, cannot object to his want of title. The law holds the first possession lawful. Motion dismissed.

Sarah Habersham v. *C. H. Hopkins, et ux.* — 1. The Court will not presume a deed to be executed by a trustee, to destroy a contingent remainder, when the deed is executed expressly to preserve it. 2. Nor will it raise a presumption to defeat a remainder from lapse of time and possession, when the time elapsed and the possession occurred in the time of the life tenant.

Levy, survivor v. *Fickling*. — In this case, the plaintiff suing as survivor of a mercantile firm, to whom the defendant gave a note, she proved the defendant's signature, and closed. The objection, that she had not proved the partnership, was made in the argument to the jury. The Judge allowed the plaintiff to supply the omission. It was held this was within his discretion.

Buck v. *Powell*. — A raft of timber, sold by an agent to convey, but without authority to sell, it was held might be recovered by the owner from the vendor.

Altman v. *McBride*.— In a deed from the plaintiff to M., the defendant's grantor, a piece of ground "a square acre, containing my family grave-yard," was excepted. It was located by the parties before the execution of the deed. This location was not exactly correct. The defendant undertook to alter it; removed the posts set up; cut down a walnut tree within the exception, as located by the parties, but not within a precise mathematical location of a square acre, including the grave-yard. The action was *trespass quare clausum fregit*. It was held, that the Judge was right in telling the jury that they might locate the *locus in quo*, by that made by the parties before the execution of the deed. The motion was dismissed.

Cameron v. *Rich*. — 1. In this case, which was against a captain of a vessel on a shipment of goods from Liverpool, it was held, that the goods, being in a damaged condition, cast upon the defendant the *onus* of showing that it arose from the perils of the seas. 2. Circumstances of injury to the vessel, which might have arisen from stress of weather, there being no proof of any such thing, it was held that the jury could not infer any such fact. Motion for new trial was granted.

Syme v. *Sanders*. — In this case it was clear the plaintiff had no regular title, derived by papers, in his ancestor; indeed it was plain, that the lot belonged to the remaindermen under the deed of a third person; but inasmuch as Arnold, under whom the defendants claimed, entered as the tenant of the plaintiff's ancestor, and as it was left to the jury to say whether he held under the plaintiff's ancestor, independent of and against the life estate, of which he had the title, and which had terminated; and they having found for the plaintiff, it was held their verdict would not be disturbed. Motion for new trial dismissed.

Cook v. *Irving*.—1. A sheriff, making an arrest under *mesne process*, must produce the body of the defendant, or return a bail bond, *unless it be in the case of a rescue*, which he may return, and which will excuse him. 2. If the sheriff arrests a prisoner under *mesne process*, and he escapes, he (the sheriff) will not be permitted to defend himself by showing reasonable diligence. Motion for new trial granted.

Carroll v. *Harrall*. — The defendant was sued, in the city court, by way of sum. pro. for running a shaft of his buggy into the plaintiff's horse, and thus killing him. The case turned upon a question of fact, whether the defendant was guilty of neglect in driving in Meeting Street. The Recorder placed his decision mainly upon the evidence of the plaintiff's carter, to

which much other evidence was opposed. His decision was regarded as the verdict of a jury, and as there was conflicting testimony, was not disturbed. Motion dismissed.

Lubbock v. *Gadsden.* — The plaintiff's boat, in ascending the Wateree, was delayed, as alleged, by the railroad bridge. The questions of delay, the cause, and the consequent damage, depended upon the conflicting testimony of the engineer of the boat and many intelligent and respectable witnesses opposed to him. The jury found for the plaintiff one thousand dollars. The Court refused to disturb the verdict, as resting altogether upon the facts. The motion for a new trial was dismissed.

Schmidtz v. *Radcliffe.* — 1. Where the indorser promises to pay a note after being dishonored, such promise will bind him, unless made in ignorance of the fact that the holder had not made a demand of payment, and given due notice, or a misrepresentation of the law of his liability. 2. To have the benefit of this exception, it is necessary that the defendant should show the same. 3. In the absence of such proof, the law implies from the promise, either that due dilligence was pursued by the holder, or that the indorser, knowing such neglect and his consequent discharge, chose to promise payment. The motion for new trial was dismissed.

Martin v. *Executors of Hamlin.* — A will, written upon two separate sheets of paper, and executed upon the last, *is well executed*, if it appears from the attending circumstances, such as the sense, appearance of the writing, &c. they made but one instrument. Motion for new trial dismissed.

Lindau v. *Arnold.* — In this case, a domestic attachment for fifty-six dollars was issued against the defendant, supposing him to be absconding or removing. On the day it was issued, he was out of the state, in Savannah, Georgia. A foreign attachment was issued by another creditor. Both attachments were levied on the same property. The domestic attachment was held to be void, and the foreign attachment entitled to the benefit of its levy. The motion was dismissed.

State v. *Clarke.* — 1. In this case, the breastpin, lost by the owner, was found in the possession of one to whom the prisoner sold it. This was held to be enough to cast on him the *onus* of showing how he came by it. 2. The prisoner made false declarations about the article stolen, to persons sent to him to obtain it, and who held out to him the hope that he would not be prosecuted if he delivered the pin. It was held these were not confessions falling within the rule, that if obtained by hope or fear, excited by one in authority, they could not be given in evidence. 3. The persons sent to him were not in authority, that is, clothed with legal power to control the prosecution, and even if confessions had been made to them, they (the confessions) would not have been excluded. Motion for new trial dismissed.

Clarke v. *Wilkie*, Executor. — The plaintiff lost a horse by the breaking down of Rantole's bridge, chartered as a toll bridge, in the name of the executors of W. Wilkie, deceased. The defendant was the only qualified executrix. Her step-daughter, for whose use the will devises the toll

bridge, was in the receipt of toll, and there was no proof that defendant had any thing to do with the management of it. A nonsuit was ordered on the circuit. It was held, that until the defendant showed that the charter was obtained without her assent, she must be regarded as the legal owner of the bridge, and therefore *primâ facie* liable for the plaintiff's loss. The nonsuit was set aside.

Quackenbush v. *Miller*. — Shannahan, the payee of the note negotiated to the plaintiff, after due, was indebted to Roberts by note. He (Shannahan) directed Roberts to call on Miller, the maker of the note to him, (Shannahan,) for payment. This was done. Miller wrote on the back of Shannahan's note to Roberts, "accepted," and signed it. R. told S. what was done, and that he had no further claim on him. S. afterwards negotiated defendant's note. It was held, that Miller's acceptance of Shannahan's note made him liable for it, and might be set up as a payment *pro tanto* on Miller's note. Motion for new trial dismissed.

City Council v. *Seeba; The Same* v. *Hahn*. — The defendants were sued under an ordinance of the city, for permitting negroes to loiter about their premises. It was held that the offence charged, in the words of the ordinance, without designation of the numbers, names of the owners, or of the negroes, or sex, was sufficiently set out. The motion in Seeba's case was granted. The motion in Hahn's case was dismissed.

Heyward v. *Wallace*. — In this case the jury found for the defendant, who was attempted to be made liable, on a representation by advertisement, of a sale to be made at auction, of a vessel. A bill of sale, without warranty of qualities or soundness, but of title merely, was subsequently executed. The subsequent bill of sale excluded the previous representations. The motion was dismissed.

Gadsden v. *Surtis*. — In this case, the defendant entered into the occupation of a house belonging to the plaintiff, which was out of repair. The agent of the plaintiff promised, when he leased it to the defendant, it should be put in repair. This was not done; and the defendant, from the leaking of the house, was compelled to abandon it. He offered, at one time, to pay two months' rent. This was not accepted. The jury found for the defendant. Their verdict was sustained.

The State v. *Thayer*. — 1. Writs of *venire facias* to summon grand and petit jurors, sealed by a wafer covered with a slip of paper, and verified by the signature of the clerk of the court, is sufficient. 2. Writs of *venire facias*, returnable to Horry court-house, a bill of indictment reciting that it was found at the same place, and a *venire* laid, at the same place, are sufficient, notwithstanding the acts of the legislature direct the Court to be held at Conwayboro', inasmuch as the latter place comprehends the former. Motion dismissed.

Miller v. *Ford et al.* — 1. The defendants, styling themselves committee (meaning that they were the committee of the board of high roads and bridges for Georgetown district,) contracted for the building of a bridge, called China Grove. They were held personally liable. 2. In such a case the joinder of the other commissioners was not necessary. 3. Whether

the board of commissioners of high roads and bridges, at the time of the contract, or at the bringing of the action, was liable, was reserved. Motion for new trial was granted.

Daw v. *Hilliard et al.* — 1. A deed poll, containing a reservation to lade and unlade goods on a slip of land adjoining the continuation of Market Street, covered by water (making thus its dock), and part of F.'s wharf, does not amount to a covenant, on the part of the city council, to permit F. to use the dock connected with Market Street. 2. A prescriptive right may exist to the use of the dock claimed by F. and his representatives. 3. There is no general right common to all people to use the dock; it belongs exclusively to the city council. Motion for new trial granted.

State v. *Simons et al.* — 1. When a conspiracy is shown, the declarations of one of the conspirators, showing an act done in pursuance of it, is evidence against the others. 2. After the conspiracy is ended, declarations of one cannot be received against the others. 3. When, on a cross-examination, the witness speaks of an affidavit made by another, such affidavit cannot be given in evidence by the party examining in chief. Motion for new trial granted.

White v. *Kelly.* — A lease of a house for a year, guarantied by the defendant, contained a covenant, that the tenant before quitting, at the expiration of the lease should give three months' notice, was held not to extend the defendant's guaranty to pay the rent for an occupation of the house, after the expiration of the year. Motion to set aside the nonsuit dismissed.

Taylor v. *Drake.* — On a sale of goods at auction, Mrs. D. bought; defendant was present, and assisted her in making selections, and promised to indorse her note, and in consequence of it, the goods were delivered to her. This was held to be a promise within the statute of frauds and perjuries.

Toomer v. *Gadsden.* — The book of the plaintiff, a physician, containing the original entries, in which the charges against the defendant were consecutively set down against him (constituting a charge against the defendant in a petit ledger) was rejected on the circuit as not being a regularly kept day-book. It was held, that the only requisition was, that it should be the book of original entries, and fairly kept, and that therefore it ought to have been received. The motion for a new trial was granted.

McLeish v. *Tylee.* — 1. The defendant, an insolvent debtor, assigned to the plaintiff goods previously mortgaged by him to John Tylee, subject to that mortgage. It was held, he could not set up the mortgage as a conclusive objection to the plaintiff's recovery. 2. In such a case, the plaintiff can only recover the value of so much of the goods as may exceed the mortgage, or if not enough to satisfy it, then only nominal damages. Motion for new trial granted.

State ex re. Barnwell v. *The City Council.* — The power of the city council to tax bonds and other securities for money at interest, where the obligors or makers lived out of the city, but the payees or obligees within it, was affirmed. Motion dismissed.

Erastus Smith v. *S. F. Brinkerhoff*, &c. — A debtor who, after his

creditor has filed his petition in bankruptcy, and with full knowledge of the fact, purchases a claim against him, cannot set it off in an action brought to recover the original indebtedness.

T. & R. Main v. *Henry H. King.* — In an action for money paid in part execution of a contract where the covenants are mutual, but which the vendor refuses to perform, the vendee is not obliged to prove a readiness to pay the whole price, before recovering back the sum already paid.

Harrison P. Liscomb v. *Gouverneur S. Bibby; Jesse Keirner* v. *Same.* — An action of debt lies to recover the costs of a summary proceeding to remove a tenant from premises held over by him after the expiration of his term, when such costs are duly taxed after notice; the amount cannot be questioned on the trial when proof has been given that the services charged for have been rendered. The only remedy is by an application for relaxation.

Walter Mead v. *J. C. Delaplaine.* — Where a usurious agreement has been reformed, and a new agreement made, removing the taint of usury, such new agreement can be enforced notwithstanding the original illegal contract.

Emily Coit v. *Wm. A. Coit.* — When a wife sues alone without her husband to recover her separate property, she must sue by her next friend. The old rule in chancery in that respect was founded on the propriety of exacting security for costs from one who might otherwise harass a party unjustly, without being liable to any penalty for her false clamor, and that rule is not abolished by the code. The objection may be taken at any time in the progress of the cause, and is not waived except for purposes of pleading, by the defendant's omitting to set it up by demurrer or answer.

Supreme Court of Pennsylvania. — Middle District. — May Term, 1850.

[From the American Law Journal.]

McMahon v. *McMahon.* Error to Huntingdon. Bell, J. When a parol partition of lands, held by several joint heirs, was made in the absence of one, and the portions of each set apart by metes and bounds, and the portion of the absent one was thrown into common with one other unauthorized, the one who was absent may at his option demand a new partition of the whole tract, regardless of long continued possession by each; or he may (as was the case here) adopt all the features of the partition, and recognize the act of the one who took his purpart as his own, and come upon it with all the improvements, and maintain ejectment for the same. Nor will the statute of frauds intervene. The act of the self-constituted agent, by such ratification, becomes in contemplation of law the act of the principal.

N. B. — Mr. Justice COULTER dissented. He held the parol partition as void, and that the absent one should have gone against the whole tract; or if he affirmed the act of the one who took his purpart, it should have been as it was made, and that was by paying his debts, which were liens upon his portion with the interest.

Stormfelt v. *The Manor Turnpike.* Error to Lancaster. COULTER, J. Though the power of the Legislature, in virtue of the right of eminent domain, to establish a turnpike gate in the street of a city, is not to be questioned, yet the grant of such a right is not to be inferred without an express enactment. The words relied upon here, authorizing the company "to erect gates in Manor street or elsewhere, according to the provisions of the original act," are too indefinite; besides the original act does not speak of Manor street. And the word "elsewhere" is too indefinite to found a right upon. The Legislature meant by Manor street nothing more than Manor road.

Judgment reversed, and judgment for defendant.

Stouffer v. *Executors of Haines.* BURNSIDE, J. The principle decided is analogous to the case of *Comfort* v. *Eisenbise*, decided at the last term, but not yet reported. There it was held, that a promise by a bankrupt to pay a debt discharged by bankruptcy, is binding, though not made to the creditor, or to his authorized agent. Further; a Court has no right to submit a point assumed by counsel, without some evidence from which it may be fairly inferred, as was decided when the case was in the Supreme Court before. It was fairly left to the jury, that if the note was not given at the time it bears date, they should find for defendant.

The Courts of Common Pleas have a right to make rules to regulate a request for instruction on points; and it is not error to refuse instruction where, according to the rules established, they have not been submitted to the opposite counsel.

Judgment affirmed.

Administrator of Hiestand v. *Porter.* Error to Lancaster. ROGERS, J. A power given in the deed to the executors to sell at the death of the widow, is well executed in her lifetime, whenever she, as one of the executors, joins in the deed, if the widow for whose benefit, as is apparent from the will, the sale is postponed, thus signified her consent by joining, and the fee will pass to the purchaser. The intention of the testator governs the case, and makes it an exception to the general rule, that a devise to executors to sell upon a certain contingency, cannot be executed till the contingency happens.

The *remainder* men cannot complain that the particular estate was yielded before it fell, and especially if benefited by an early receipt of the proceeds.

N. B. — Mr. Justice COULTER dissented, holding the case to be within the general rule, that there was no power to sell before the death of the widow, and there was no provision made before that time, for distribution of the proceeds.

Judgment affirmed.

Spangler v. *The County of York*. Error to York. Bell, J. Where the dower fund of a widow is directed to be invested in real estate, and the interest to be paid to her during her life, the principal to be divided at her death, the sum so put at interest is taxable for state and county purposes, under the act of 11th June, 1840, and the tax is not to be paid out of other monies of the estate; or out of the trustee's proper funds; or out of the principal sum so invested; but on the principle that whoever presently enjoys the subject, ought to discharge the present impost. The present beneficiary is liable to pay the taxes. The burden must come from the produce of the fund.

Judgment affirmed.

Hoffman et al. v. *Danner et al.* Error to York. Bell, J. The quantity of land which passes by sheriff's sale, is to be ascertained by the extent of the levy. As at the date of the execution the whole lot in controversy belonged to the defendant in execution, the plaintiff might have directed a levy and sale of the whole of it, yet he was at liberty with the assent of the debtor to embrace a less quantity, and if he did so, or permitted the sheriff by the use of a limited and restricted description, to indicate an intent to take in execution a smaller portion, the purchaser, who claims only through the proceedings of the officer, will not be permitted to stretch his ownership beyond the designated boundaries, even though the sheriff's conveyance, by an extended description, might seem to afford warrant for such a pretension.

Though the construction of written instruments is within the exclusive province of the Court, yet where the quantum of the estate and its limits, as in Pennsylvania, must frequently depend upon evidence *de hors* the writing, and thus become a question of fact, it is error to direct peremptorily a verdict.

This is peculiarly true of the loose written returns of our writs of execution, which ignorance and carelessness combine to divest of every feature approaching to certainty. It is necessary to allow the liberal use of assisting evidence, oral and documentary, to correct mistakes, explain ambiguities, and apply indeterminate delineations to disputed localities. If the return is intelligible of itself, and ascertains with precision the tract taken in execution, no room for explanatory proof is afforded, and none will be received to contradict the official act. But where either from the generality of the terms used, uncertainty of delineation, or seeming contradiction of description, a doubt is raised affecting the boundaries of the levy, its locality or extent, recourse must be had to evidence *aliunde*, in which case it becomes a legitimate object of investigation for a jury.

In this case, the Court below proceeded upon the idea that the return of levy "upon a lot, marked in the plan of Hays addition, No. 14," in connection with the plan itself, is so precisely descriptive, as not to be controlled by subsequent specifications of boundary. In this there was error. If any thing showed that the sheriff might have reference to a fact, line or boundary which reduced the lot he intended to take in execution, to the width of three perches, the jury should have been called to the aid of the Court.

Judgment reversed, and a *venire de novo* awarded.

Melhorn v. *Moritz*. Error to Adams. COULTER, J. Though in the action for a breach of the promise of marriage, the contract must be mutual, so as to have consideration, yet witnesses need not be called to attest it when made to sustain the action, out of regard to the delicacy of the female. It must be proved by the concomitant circumstances.

In this case a distinct promise was proved on the part of the defendant; and it was competent for the plaintiff to prove such circumstances, as that she had requested her brother to take her to Gettysburg to buy her wedding clothes; that she had engaged her bride's-maid; that she named a day certain for the wedding; that the wedding clothes were purchased, and guests invited; to make out the mutual promise. This is only circumstantial evidence, in place of direct evidence of her agreement, at the time the engagement was entered into.

And evidence that the defendant was subsequently married to *Hannah*, instead of *Anne*, as charged in the declaration, was not error. The statement of the *name* to whom he was married was immaterial; it might have been struck out of the narr., as it was laid under a *videlicit*. Even if material, the narr. would be good on the principle of *idem sonans*.

Judgment affirmed.

Emery v. *Harrison*. Error to York. COULTER, J. Deeds for lands sold under the laws of the United States for non-payment of taxes, are not even *prima facie* evidence of title or right, without proof of authority to sell, and all the other prerequisites, such as that the seller was collector of that district, evidence of assessment, of a personal call for the taxes within sixty days after assessment, that there was no personal property, of advertisement as required by act of Congress, &c.

Though a father may admit a tenancy of the land in dispute, yet if there is no privity of possession or estate between the father and son, the latter will not be affected; and a deposition which goes no further, and without an offer to follow up, may be properly rejected.

Judgment affirmed.

Bear v. *Bear*. Error to Lancaster. BURNSIDE, J. In a devise of land by boundaries, a mistake in the quantity devised will not control the boundaries, so as to let in the residuary legatee for the excess; nor will it be held that the testator died intestate in regard to it.

Judgment affirmed.

McCracken et al. v. *Gillam*. Error to Huntingdon. BURNSIDE, J. In a suit for the unpaid purchase-money, when it appeared that the plaintiff had said that the title was good, and he would make a good title, but in fact did not warrant either specially or generally, and the title failed, the plaintiff cannot recover. The *onus* lies on the vendor, to show the purchaser took at his own risk.

Judgment affirmed.

Miscellaneous Intelligence.

The New York Code. We find the following notice of the concluding reports of the Commissioners of the Code of Procedure, in the London Jurist, a journal of the highest authority among the legal profession in England. It is gratifying to have reforms of so radical a character approved of in such quarters :

" We have just received a very valuable work from America, consisting of two reports made by the Commissioners on Practice and Pleadings, appointed by the government of New York, to the legislature of that state ; the one reporting a code of *civil procedure*, the other a code of *criminal procedure*, for the consideration and adoption, if approved, of the legislature ; and in order to induce those of our readers who pride themselves on being *practical* men, and on hating every thing that is to be, but is not actually done, not to turn aside from any thing we may say on the subject, scared by the words ' report ' and ' code,' we will inform them that a part of the code recommended by the commissioners, has been for some time passed into law, by an act of the 11th of April, 1849, (see 13 Jur., part 2, p. 225,) and been since practically at work in the state of New York ; and that, as to the remainder of the regulations proposed, we are informed by one of the learned commissioners, that it is considered probable that they also will, before long, be passed into law.

" The object of the code, and the principle adopted in its formation, are best expressed in the words of the learned commissioners themselves. It is, they say, ' intended to embody the whole law of the state concerning judicial remedies in civil cases, and to supersede the third part of the revised statutes, a portion of the first and second, a large number of subsequent statutes, and all of the common law on the subject of civil remedies.'

" And further : ' It was a question with the commissioners of some embarrassment, how far it was wise to go into details. There were two opposite difficulties to be avoided ; on the one hand was the danger by provisions too general, of leaving a wide space for judicial discretion ; on the other, equal danger, by going into minute details, of making the practice inflexible and intricate, increasing the risks of mischance, and leaving unprovided for whatever particulars were unforeseen. Whether they have succeeded in finding what they desired — a middle path between a judicial discretion, too wide for safety on the one hand, too narrow for convenience on the other — can only be known by the result. It is impossible, within the compass of this communication, to give any other than the most general account of the Code, as it is now presented. It is divided into four parts. The first relates to the Courts of Justice, their organization and jurisdiction, and the functions and duties of all judicial and ministerial officers connected with them ; the second embraces the subject of civil actions, with all

their incidents; the third relates to special proceedings; and the fourth to evidence.'

"We are not at present about to examine generally the nature of the proposed American Code, though we shall probably return to it as occasion may render the consideration of any of its articles interesting. We shall confine our present observations to the suggestions made in the chapter on evidence; suggestions in which we take particular interest, because they proceed upon the principles which we have often advocated in THE JURIST, and which have not yet been, though we have little doubt that they will ultimately be, acted upon in this country.

"The 6 & 7 Vict. c. 85, (Lord Denman's Act,) removed the objection to the competency of a witness on the ground of interest or crime; but it left still subsisting the incapacity of a party to a suit or action. So does the American law still; but, by the new code, it is proposed to admit the evidence of parties, as well as of any other interested persons; and there is to be no exclusion of evidence but on the ground of incapacity from unsoundness of mind, or incapacity arising from tender age, and on the ground of confidence. The grounds on which the admissibility of the evidence of parties has been advocated by gentlemen of considerable legal knowledge and experience, are familiar, probably, to many of our readers, from a perusal of the report made by a committee of the Law Amendment Society, which was recently printed and circulated. But it will be, perhaps, more interesting to practical men to know, that the plan has been tried, and with success, in the State of Connecticut. We quote from the report of the American commissioners, a communication made to one of them by the Lieutenant-Governor of the State of Connecticut on the subject. He says: 'As the statute is recent, and excepts from its provisions suits pending at its passage, the experiment has not been fully tested. So far, however, as it has been tried, I may safely say, after conversing with eminent gentlemen of the bar in different parts of the state, and from my own observation, professional and judicial, that the result is highly satisfactory. So important a change in the rules of evidence met, of course, at the outset, a very earnest opposition, especially (with some distinguished exceptions) from the senior members of the profession. Their fears, I believe, are in a great measure quieted, and I am not aware of any intention or desire to attempt a return to the old system.

"'Many innovations on the principles of the common law, relating to the admissibility of interested witnesses, had formerly been made in Connecticut. The most common action with us is "book debt," and in this the parties, and others having an interest in the event of the suit, had always been allowed to testify. The action of account at law is still in constant use here, in which the same rule exists. In other cases special statutes had obviated the difficulties arising from the restrictions of the common law, until it was found that either both of the parties, or one of them, were permitted, or might be required to testify in about twenty of the different forms of the civil and judicial proceedings. These changes having proved salutary, it was at last deemed safe and expedient to throw open the door

entirely. There appears no tendency to go back; and as soon as the new system is firmly established, I think it will be a matter of surprise that any other should ever have obtained.'

"We trust that this evidence will go far to remove the prejudice that still exists against the extension to actions involving large interests, of that practice of examining the parties which it is, we believe, generally admitted, works well in the so-called insignificant cases within the jurisdiction of the county courts."

List of Reporters. — The following list of Reporters has been prepared by a learned member of the Philadelphia bar, and is, probably, as correct a list as has ever been published.

English, American, Scotch and Irish Reporters.

Acton,
Adams,
Addams,
Addison,
Adolphus & Ellis,
Do. do. New series,
Aiken,
Alabama,
Alcock,
Do. & Napier,
Aleyn,
Ambler,
American Leading Cases,
Anderson,
Andrews,
Angell,
Annally,
Anstruther,
Anthon,
Appleton,
Arabin, (Burlesque,)
Armstrong,
Do. & McCartney,
Arnold,
Ashmead,
Ashe's Tables in Keilwey,
Atkyns,

Bailey,
Do. Chancery,
Ball & Beatty,
Baldwin,
Barbour,
Barbour Chancery,
Barnardiston, K. B.,
Do. Chancery,
Barnes' Notes,
Barnewall & Adolphus,
Do. & Alderson,
Do. & Cresswell,
Barr,
Barron & Arnold,
Do. & Austin,
Batty,
Bay,
Beatty,
Beavan,
Bee,
Bellewe, Hen. VIII.,
Do. Rich. II.,
Belt, Supplement to Vesey, Sen.
Benloe & Dallison,
Do. New,
Do. Old,
Do. in Ashe,
Do. in Keilwey,
Ben. Monroe,
Berton,
Bibb,
Bingham,
Do. New Cases,
Binney,
Blackerly,
Blackford,
Blackstone, Wm.
Do. Hen.

Bland,
Bligh,
Do. New Series,
Bosanquet & Puller,
Botts,
Brayton,
Breese,
Brevard,
Bridgman, John
Do. Orlando,
Brockenbrough,
Do. Cases,
Do. & Holmes,
Broderip & Bingham,
Brooke, New Cases,
Brown, Chancery,
Do. Parliament,
Browne, P. A.,
Brownlow & Gouldsborough,
Buck,
Bulstrode,
Bunbury,
Burritt,
Burrow,
Do. Settlement Cases,

Caines' Cases,
Do. N. Y. Term,
Caldecott,
Call,
Calthrop,
Cameron & Norwood,
Campbell,
Carolina Law Repository,
Carrington & Kirwan,
Do. & Marshman,
Do. & Payne,
Carrow,
Do. Hamerton & Allen,
Carter,
Carthew,
Cary, Chancery,
Cases in Chancery,
Do. in Practice,
Do. temp. Finch,
Do. do. Hardwicke,
Cases temp. Holt,
Do. do. King William III.,
Do. do. Macclesfield,
Do. do. Queen Anne,
Do. do. Talbot,
Chancery Calendars,
Chandler, Criminal Trials,
Charlton, (*R. M.*)
Do. (*T. U. P.*)
Cheves,
Chipman, (*N.*)
Do. (*D.*)
Chitty,
Choice Cases in Chancery,
Clark & Finnelly,
Clarke,
Clayton,
Cobbett,
Cockburn & Rowe,
Coke,
Coleman,
Do. & Caine,
Colles,
Collyer,
Colquit,
Comberbach,
Comstock,
Comyns,
Connecticut,
Connor & Lawson,
Cook & Alcock,
Cooke,
Cooke,
Cooper, Chan. Cases,
Do. Practice Cases,
Do. Rep. temp. Brougham,
Do. do. do. Cottenham,
Corbett & Daniell, Election Cases,
Cowen,
Cowper,
Cox, Chancery,
Coxe,
Craig & Phillips,
Cranch,
Crawford & Dix,
Do. do. Circuit Cases,

Cresswell,
Croke,
Do. Admiralty,
Crompton & Jervis,
Do. & Meeson,
Do. Meeson & Roscoe,
Cunningham,
Curry,
Curteis,
Cushing,

Dallas,
Dallison,
Dalrymple,
Dana,
Daniel,
Danson & Lloyd,
Davies, Irish,
Do. English,
Do. American,
Do. & Merrivale,
Day,
Deacon,
Do. & Chitty,
Deas & Anderson,
Denio,
Dennison,
Desaussure,
Devereux,
Do. & Battle,
Do. & Battle, Equity,
Dickens,
Dodson,
Douglas,
Do. Election Cases,
Douglass,
Dow,
Do. & Clark, or Dow N. S.
Dowling & Lowndes,
Do. & Ryland,
Do. Points of Practice,
Drinkwater,
Drury & Walsh,
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License Laws. — We have been requested to publish the following message of the late Governor of Maine to the Legislature of that State. The immediate occasion of the message will appear from its contents, and it would at first seem to have a merely local interest. But the objections to the inquisitorial character of the process proposed are well worthy of consideration without the limits of Maine.

To the Senate and House of Representatives:

The last legislature, at the last hour of its session, passed to be enacted, a bill entitled, "An act in relation to common sellers of intoxicating liquors." That a bill, important in its provisions and complicated in its details, should receive its final passage and be presented to the executive for his examination and approval, in the midst of the haste and confusion of a final adjournment of the legislature, furnishes a perfect justification to that officer, in withholding his signature, unless it be assumed, that in discharge of his duty, as a co-ordinate branch of the law-making power, he is but the echo of the opinions and recorder of the acts of the two houses of the legislature.

I doubt not that this consideration has secured to me the approbation of all *candid* minds, in availing myself of that provision of the constitution, by which I was authorized to retain the bill for further consideration, and return it, either with or without my approval, to the legislature when next in session.

The hasty reading of the bill, under the circumstances above alluded to, disclosed the fact, that it provided for the opening to public inspection, not only the places of business, but the firesides of all our citizens, exposing the secrets of the family circle to the public gaze and the prying eye, and the question very naturally presented itself, whether a public necessity demanded, or a public good would result from such an invasion of the sacred precincts of home. In announcing to the legislature, that I should retain the bill for further consideration, I called attention to this obvious feature, as a reason for adopting that course. But I refrained from alluding to the fact, that the bill *apparently* deprived those charged with a violation of its provisions of the constitutional right of a trial by jury, because I considered it improbable that an attempt had been made to infringe upon so dear a right, and thought that it might be found preserved, by some of the references, therein made, to previous laws; a point which could only be determined by such careful examination and comparison, as I was then unable to give it.

With this explanation, I will proceed to examine the bill in detail, and first, that portion of it authorizing search. And here it may be appropriate to remark, that even far back in the days of feudal violence and disregard of individual rights, a man's house, however humble, was his castle, his fortress, protected by common consent and by common law, against the forcible entry of even the minions of almost unlimited power; a spot sacredly veiled from the scrutiny of the tyrant's jealous eye, except on rare and extraordinary occasions. If there is one right, which the individual has more uniformly claimed of his government, and clung to with more tenacity than any other, it is that of regarding his home as inviolable, secure from forcible entry and search. Probably there is not a civilized nation in the world, however arbitrary the form and spirit of its government, where this right is not recognized, either by constitutional, statute, or common law. The constitution of the United States contains a provision applicable to all the states of the Union, as follows: "The right of the people, to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The framers of the constitution of Maine, as if not satisfied with this simple guarantee of the constitution of the Union, incorporated into our constitution the same provision. The feeling which prompted this caution is a natural one, and may readily be appreciated, by supposing our own homes to be the theatre of an official search, perhaps instigated and witnessed by those, whose curiosity, malignity or revenge, would be gratified by an exposure of all the details and private arrangements of our domestic life, or by an examination of our books, our business, our papers, even the records of our most secret thoughts. The constitution solemnly pledges to

each citizen of the state, protection from such a violation of the sanctity of his home. Are the provisions of the bill in question consistent with this constitutional pledge? Are not our homes practically thrown open by it, to the public gaze?

The bill, section 2, provides that "Any justice of the peace, on complaint made to him, in writing, under oath, by three persons, that they have reason to believe and do believe, that intoxicating liquors are sold in violation of law, designating the persons and places, may issue his warrant to any officer, empowered by law to serve the same, commanding him to search the places designated, for such liquors, and the apparatus of selling, and other evidences of a violation of the laws in relation to intoxicating liquors." Probably, every community within the limits of the state has in its midst those who are regardless of the obligations of an oath, those whose opinions are the result of passion and prejudice, those who readily receive the whisperings of suspicion as the voice of truth, those who lend a willing ear and a prompt assent, to the tongue of slander. On the mere *belief*, feigned or real, founded or unfounded, of persons of any of these descriptions, without the requirement of a single fact for this belief to rest upon, the magistrate may open to them the doors of our dwellings — authorize an examination unlimited in its minuteness, extent, or duration, and a seizure of both our persons and property. It is true, the issuing the warrant may be, to a certain extent, within the discretion of the magistrate; but magistrates can every where be found, who will readily lend themselves the willing instruments of the worst designs, and in this instance there is no power to restrain them. It may be said, that only public houses, stores, &c., would come under the operation of the bill, but the bill is general in its application, without any such restrictions. Undoubtedly, in large towns, suspicion would be chiefly confined to such places, except (as would often be the case) when prejudice and malice gave to it a different direction. But out of those large towns, the illegal sale is supposed to be more frequently practised in private dwellings than elsewhere; hence inquiry, suspicion and "belief," would be in that direction; and under the bitterness and feuds which the discussion of this whole question has engendered in every community, but few occupy such position as to be secure that the suspicion and "*belief*" might not wantonly or otherwise be fixed upon *them* and their dwellings How easily a hint unkindly given becomes a report, and how readily would prejudice build, upon such a report, the "belief" upon which the search is made to depend!

The constitution requires, that search warrants shall contain a "special designation of the place to be searched, and *the person or thing to be seized*," but the warrant, authorized by the bill, contains no such special designation of the person or thing to be seized, but commands the officer "to search the *places* designated, for such liquors, and *the apparatus of selling, and other evidences of a violation of the laws*," leaving it to the caprice of the officer to determine, what are, and what are not, "apparatus of selling, and the evidences of the violation of the laws."

The bill also provides, that "if the officer, on such search, shall find

such liquors and other evidences of selling, he shall make return thereof on the warrant, and bring the person, in whose possession the same are found, before the court, to which such warrant is returnable." Here is an unconstitutional blending of executive and judicial duties; first, the officer must make the search — an executive act; next, he must judge, whether the result of his search furnishes evidence of selling — of guilt — that is clearly a judicial act; and if the evidence of guilt is in his judgment sufficient, then must follow another executive act — the seizure of the articles and of the person in whose possession they are found. The evidence of selling, requisite to justify the arrest, may be greater or less, as the *judicial caprice* of the officer may dictate.

Under the requirement upon the officer to "bring the person, *in whose possession* the same (liquors and other evidences of selling) are found, before the court, to which such warrant is returnable," the person brought may or may not be the person named in the warrant; for if the officer in making the search finds liquors, and what he judges to be "evidences of selling," in the possession of a person not named in the warrant, he must bring him before the court, without a complaint, warrant, or legal process of any kind.

Here then, the ordinary safeguards, with which the constitution intended to surround the necessary exercise of the right of search, have been entirely neglected, so that on the mere "belief" of any three men, *any* justice of the peace may empower an officer to make unrestricted search of the premises of any of our citizens, to seize such books, papers or property as he may please to consider evidence of sale, and to arrest such persons, as he may please to suspect, on such evidence, guilty of sale; and this is our constitutional security against unreasonable search and seizure!

It is true, that in several instances, our laws have authorized search, on complaint of a magistrate, without serious inconvenience or abuse. The most important instance of the exercise of this right is where goods are stolen, or obtained by false pretences; and here there must be a pre-existing fact, not merely suspected, but *known* to the complainant, to wit, the loss of the goods; and when such a fact exists, the person suffering the loss, in instituting search, will give to it only that direction which the circumstances may indicate, as most likely to result in the recovery of his property. Here we have a fact, and, consequent upon it, a motive which excludes the idea of action upon mere vague suspicion, prejudice, or passion — a double safeguard against abuse, which has no counterpart in the case in question. So too with all other laws authorizing search; they are so guarded, or so limited in their application, that there can be no danger of general abuse. For instance, the number is small to whom the suspicion could possibly attach, of violating the law which regulates the keeping of gunpowder, and authorizes search to discover its illegal possession; and when such suspicion does exist, a warrant for search can only be granted to one of the officers of the town, on his own application, made in his official capacity, authorizing *him* to make the search.

Another important distinction between this, and all other laws of this

character, is that the latter *only* authorize search, for property *illegally* in the possession of the person whose premises are to be searched, while the former authorizes search for property, which every person *may* legally possess and use, and which our whole population, with but rare exceptions, *do* possess and use. The mere suspicion of this common legal possession, may induce a suspicion of illegal use; and thus the suspicion of illegal use, resting upon the other suspicion of legal possession, may be the foundation of a "belief," in relation to any of our citizens, which would expose his person to arrest, and open his premises to the gaze and inspection of any three meddling or malicious intruders.

It therefore cannot be regarded as just, to cite our present laws, as precedent for one so unguarded in its details, so universal in its application, and consequently so liable in its execution to universal abuse. Under those, (our present laws of search,) individual rights may, at times, be violated, though protected by all the guards which the nature of the case furnish or permit; but under this, our whole population are exposed, without check, limit, or restraint. All laws *may necessarily* invade and endanger, to a certain extent, individual rights; but it does not follow, that all individual rights should, by law, be wantonly invaded and endangered.

The constitution does not interpose an unqualified prohibition of the exercise of the right of search; its guarantee to the citizen is against "unreasonable search." If, then, the search for which the bill provides is designed to accomplish a great social good, and, at the same time, is adequate to the design, it is reasonable and therefore constitutional, aside from the defects in detail to which I have alluded. It is therefore pertinent to inquire how far the anticipations of the friends of the bill are likely to be realized, in the accomplishment of the object designed — the suppression of intemperance.

It is contended, that the present law is inoperative, because the evidence necessary to convict those who violate it cannot be obtained; and the friends of this bill claim that its provisions will enable them to supply the deficiency; this is the admitted chief object of its passage, and this object it must secure, or be entirely nugatory. For the purpose, then, of testing its effect, we will suppose that the law is in operation, — that search warrants are issued to obtain evidence against those engaged in illegal sale, — and that, contrary to the expectations of many, search is permitted without resistance or hindrance. By well directed search, ardent spirits may undoubtedly be found, under circumstances calculated to excite the suspicion that it is kept for illegal sale, but not with accompaniments which would furnish *evidence* of such intention. For it is not probable that any places of sale, except those in a few large towns, are fitted up with any thing more than the *necessary* apparatus; and the necessary apparatus is only such articles as are in daily, constant use, in every house, store, and workshop. Wherever the arrangements were on a more extended scale, the approval of the bill would have been a signal for the removal of all appendages calculated to excite suspicion of the traffic. And here we have the extent of the evidence, in aid of conviction, which all this process can pos-

sibly furnish, — the discovery of liquors, which every person has a right to keep and sell in packages as imported, and of a few articles of domestic use, such as every person *does* keep. If this evidence will convict one, it will convict nearly the whole of our population. It should be borne in mind, that, whenever search is instituted under any of our present laws, it must be for property, which, if found in the possession of the person whose premises are searched, is *illegally* in his possession, and the finding, therefore, furnishes almost conclusive evidence of guilt. But no such deduction of guilt can be made from the discovery of the mere *legal* possession of an article, which is in common use, even though that article is of such a nature that it may be used for the most injurious and dangerous purposes.

From these considerations, it seems obvious that while search under all our present laws may furnish almost conclusive evidence of crime, the search authorized by the bill in question must entirely fail to produce such evidence, and, failing of this, it fails to accomplish its only object. Hence the one is reasonable and constitutional, while the other is "unreasonable," and consequently unconstitutional.

I have thus far shown, that the right of search is of so delicate a nature, that it should be always used with the utmost caution; that this bill in authorizing its exercise, neglects those safeguards in detail, which both the constitution and safety of the persons and property of our citizens require; that its peculiar features are unsustained by any precedent drawn from our former laws; and that the search itself, inadequate as it is to accomplish the good designed, is "unreasonable," and therefore unconstitutional.

We will now inquire what judicial proceedings the bill requires, in relation to the persons and property which may be seized on a warrant for search, and brought "before the court to which the warrant is returnable?" and here we are left to grope in obscurity and uncertainty. It should be observed, that the only court to which such warrant is returnable, is a justice of the peace.

As I have before shown, a person against whom there has been no charge, no complaint or warrant, may, at the discretion of the officer, be arrested and brought before the court; and it may be interesting to inquire, whether the court shall try, as the officer arrested, dispensing with all the ordinary forms of legal proceedings. Such a trial is no greater violation of personal rights than such an arrest; the one is a proper sequel to the other, and was therefore probably intended; the bill however throws no light upon the subject.

Although the bill authorizes the seizure of a man's property, it does not confiscate it, the property still remains his. The number, value, or importance to the owner, of the articles, would depend upon the caprice of the officer. He may seize his liquors, portions of his furniture, as apparatus of sale, and his account books, orders and letters, as evidence of sale. A slight regard for the rights of property would have induced a provision for their custody and return; but no such provision is made.

But we will pass these minor objections, to the more important examination of the provisions for the trial, and punishment of a person arrested.

Section three, after requiring that the person shall be brought "before the court to which said warrant is returnable," reads as follows: "And if said court is satisfied, from the whole evidence in the case, that such person is a common seller, or keeps intoxicating liquors, with intent to sell the same, in violation of law, he shall be subject to the penalty and punishment provided in section one of this act." The penalty and punishment thus provided is "forfeiture of not less than fifty, nor more than three hundred dollars, or imprisonment in the county jail, not less than thirty, nor more than sixty days." If the court (a justice of the peace) is "satisfied," that the person is a common seller, he shall be "subject" to the penalty and punishment provided. Is it intended, that the justice shall proceed to try, sentence, fine and imprison? He must proceed so far as to be "satisfied" of his guilt, or the person cannot be subject to the penalty and punishment; and yet he has no jurisdiction — cannot render judgment, where the penalty exceeds twenty dollars. Section four reads, "all fines and forfeitures provided in this act, may be recovered in the mode provided in chapter thirty-six, of the revised statutes." This *seems* to secure a trial by jury, before a court of competent jurisdiction; but what is the issue before that court? Not whether the person is guilty of the offence charged, but whether the justice to whom the warrant was returned, is satisfied of his guilt. The bill makes the person "subject" to the penalty or punishment, whenever the justice is "satisfied" of his guilt, and consequently the higher court must enforce that penalty or punishment, on the presentation of evidence that the justice *was* thus satisfied. This evidence must necessarily be of a lower order than the record of a formal judgment; for having no jurisdiction, the justice could enter no judgment; perhaps his written certificate, or perhaps his oral statement might suffice.

Now we are brought irresistibly to this alternative; that the bill provides that our citizens shall be seized, tried, fined and imprisoned, without jury, by a court of incompetent jurisdiction; or that in preserving the form of trial by a competent court and jury, it preserves the *form only*, requiring the higher, competent court, to impose penalties and inflict punishments on proof of the mere opinion, not formal judgment of the inferior, incompetent court — the one a direct and gross, the other, an indirect and shameful violation of the right to be secure in person and property, and of trial by jury.

I am confident, that this ill digested outrage upon almost every right of our citizens, could only have received the sanction of the legislature in the haste and confusion of a final adjournment. But be that as it may, the moral and social well-being of the state is so dependent upon the advancement of temperance, that I am unwilling to be in any degree instrumental in burthening or retarding it with a law so justly odious, and at the same time ineffectual.

Immediately on the announcement that I had withheld my signature from the bill, petitions signed by more than three thousand persons were presented to me, urging its approval. But in justice to those persons, I am forced to the conclusion, that their signature was but the hasty expression

of a wish for *some* legislative action, in promotion of the cause of temperance, rather than an indication of approval, founded on careful examination of the features of the bill.

The great number and importance of the objections which the bill presented, have forced me, in commenting upon them, to extend this communication to far greater length than I desired. But I do not feel at liberty to leave the subject in which the whole community have so great an interest, without a frank expression of my deep-seated conviction, that this, and all kindred measures, for the suppression of intemperance, will prove abortive. While I admit that a restraining influence may be exerted, by judicious, wholesome laws, I regard it as a perfect truism, that the community cannot be *compelled* to be temperate, and that every step, which is taken in this compulsory process, is plunging it deeper and deeper into the abyss of intemperance. What has been the effect of our present law, which, when passed, was to be the panacea for this great evil? All admit that intemperance has increased under it, but it is claimed by its friends, that the law has only failed of its object for want of evidence on which to procure conviction; men, they say, will not testify against those who supply them with intoxicating drinks — that they will suppress and deny the truth for their protection. What a striking admission is this, of the futility of such forcible means — an admission that it has driven thousands to countenance — to encourage — to perpetrate perjury, while at the same time, it has given them increased determination and facilities, to indulge in their cups — an admission, that men will be driven to any extremity, rather than yield a forced surrender of what they regard their rights. This almost universal rule of action, with individuals, communities and states, has been entirely overlooked in all these measures. Another most conclusive evidence that this system is wrong, may be found in the fact, that a portion of its advocates, in their efforts to sustain it, have become so obtuse in their moral perceptions, as to league together, for the open public purpose of practising frauds, and holding out false pretences to procure violations of the law, so that they may impose its penalties. A great reform cannot be accomplished by means which require such aids, neither is it safe in the hands of those who will resort to them.

I object, then, to the whole system of legislation, of which this bill forms a part, because, not being enforceable, it cultivates a general disrespect and disregard of law — because it weakens the moral sense of the community, by inducing one class to wink at the suppression of truth, to encourage falsehood and even pepetrate perjury, for the purpose of evading its penalties, while it induces another class to defraud, deceive, and hold out false pretences, that its penalties may be imposed — and finally, because, while it does all this avowedly for the suppression of intemperance, it in fact increases it, by giving force and energy to man's natural inclination to indulge his cupidity or his appetite, in selling or in drinking, without imposing any effectual restraint.

Instead, therefore, of pressing onward in these extreme measures, and

ascribing the failure of each to the lack of one still more extreme, while the community are sinking deeper and deeper in intemperance and other vices, is it not time to pause and candidly consider, whether the whole system is not founded in entire ignorance or disregard of the motives which universally control human actions? And if thus radically wrong, whether it can be so perfected in detail, as to produce favorable results?

I return the bill, with these, my objections, to the House in which it originated. JOHN W. DANA.

Council Chamber, May 7, 1850.

CONSTITUTION AND ADMINISTRATION OF JUSTICE IN NORWAY.— Mr. John S. Maxwell has furnished an interesting work called "The Czar, his Court and People," &c., from which we make the following extracts. Of course we have no pettifoggers in this country. Wherever they exist they are in truth the "banditti of the bar."

The Constitution of Norway.

"The Storthing, or Congress, is elected every three years; it assembles *suo jure*, and not by the royal proclamation. It has the initiative in the making of laws, regulates the currency, taxes, revenues, and expenditures of government, and exercises all the powers necessary for a complete administration of the affairs of the country.—The Storthing or Congress, immediately after it assembles, elects a President and chooses from among its members one fourth of the whole body to constitute an upper house or Senate, which is invested with powers much like those of the Senate of the United States, and exercises judicial functions in cases of impeachment. The remainder constitute the lower house or chamber of deputies, corresponding to the House of Representatives in the United States. A measure proposed and passed in the lower house, is sent to the Senate for confirmation or amendment, as in other bodies thus constituted. After it has received the sanction of both houses, it requires the assent of the king to become lawful. If the royal assent is refused, the next Congress may advocate and confirm the same measure, and the king may again refuse his assent;—but if a third Congress shall again pass it, then it becomes a law, the veto of his majesty to the contrary notwithstanding. Every native of Norway, who is of age, who is a tax payer, or who is the owner of a freehold worth one hundred and fifty dollars, and who is not a courtier or office-holder, or disabled by reason of mental infirmity, or incapacitated because of a conviction or imprisonment for an offence against the welfare of society, is entitled to elect and to be elected. The country is divided into election districts, and the electors are registered in each district. Every three years the voters assemble in some convenient place, and out of every hundred a delegate is chosen to attend the convention of the delegates of the district, who choose from among themselves as many members as the district may be entitled to send to the Storthing. The working of this constitution has been all that could be desired. Beneath its influence, the progress and improvement of the country, and the amelioration of the condition of the people, is beyond all precedent in European history."

Administration of Justice among the Norsemen.

"The administration of the civil law in Norway is most admirably contrived. In every school district, the freeholders elect a Justice of the Court of Reconciliation. Every lawsuit must first be brought before this justice, and by the parties in person, as no lawyer or attorney is allowed to practice in this court. The parties appear in person, and state their mutual complaints and grievances at length, and the justice carefully notes down all the facts and statements of the plaintiff and defendant, and, after due consideration, endeavors to arrange the matter, and proposes for this purpose, what he considers to be perfectly just and fair in the premises. If his judgment is accepted, it is immediately entered in the court above, which is a Court of Record; and if it is appealed from, the case goes up to the District Court, upon the evidence already taken in writing, by the Justice of the Court of Reconciliation. No other evidence is admitted. If the terms proposed by the justice are pronounced to be just and reasonable, the party appealing has to pay the costs and charges of the appeal. This system of minor courts prevents a deal of unnecessary, expensive, and vexatious litigation. The case goes up from court to court upon the same evidence, and the legal argument rests upon the same facts, without trick or circumlocution of any kind from either party. There is no chance for pettifoggers, the banditti of the bar. Poor, or rich, or stupid clients, cannot be deluded, nor judge or jury mystified by the skill of sharp practitioners in the courts of law in Norway. More than two thirds of the suits commenced are settled in the Court of Reconciliation, and of the remaining third not so settled, not more than one tenth are ever carried up.

"The judges of the Norwegian courts are responsible for errors of judgment, delay, ignorance, carelessness, partiality, or prejudice. They may be summoned, accused, and tried in the Superior Court, and if convicted, are liable in damages to the party injured. There are, therefore, very few unworthy lawyers in the Norwegian courts. The bench and the bar are distinguished for integrity and learning. They have great influence in the community, and the country appreciates the many benefits which have resulted from their virtue and their wisdom."

Curious Decisions. — The English law papers report one or two strange decisions that have lately been made by the Vice-Chancellor. In one of the cases, it appeared by the evidence tendered on the trial that a Mr. Hartley, deceased, in 1843, left directions in his will that £300 should be set apart as a prize for the best original essay "On the Subject of Natural Theology, — treating it as a substantive science, and demonstrating the truth, harmony, and infallibility of the evidence on which its foundations are laid, and the perfect accordance of such evidence with reason; also demonstrating the adequacy of natural theology when treated and taught in this scientific form to constitute a true, perfect and philosophical system of universal religion, (analogous to other universal systems of science, such as astronomy, &c.,) founded on immutable facts and the works of creation, beautifully adapted to man's reason and nature, and

tending, as other sciences do, but in a higher degree, to improve and elevate his nature, and to render him a wise, happy, and exalted being." It was ruled by the Vice-Chancellor that this bequest was void, on account of the evident tendency which the essay so described would have to demoralize society and subvert the church. The case of the Bridgewater Treatises was cited in support of the legality of such a bequest; but the example was overruled. The same law must clearly apply to every attempt to support religion by evidence taken from the side of nature, and the Bridgewater Treatises was clearly a case in point. Another decision arising out of the same trial, is yet more curious. Mr. Hartley had left £200 for the best essay on Emigration, and appointed the American Minister trustee of the fund. This bequest was also declared void, on the ground that such an essay would encourage persons to emigrate to the United States, and so throw off their allegiance to the Queen!

Notices of New Books.

Report of Cases Argued and Determined in the Supreme Court, and in the Court of Errors and Appeals, of the State of New Jersey. By A. O. Zabriskie, Reporter. Vol. I. Including, in Supreme Court, from January term, 1847, to October term, 1848, and in Court of Errors, Cases from July term, 1845, to October term, 1848 Printed by D. Fitz Randolph. New Brunswick, N. J., 1850.

The above copy of the title-page of the first volume of a new series of New Jersey Reports, indicates the task which the Reporter has undertaken. It remains for us to say, that that task has been faithfully and successfully performed. We think this volume will compare favorably with the Reports of other States, and that the series which it leads will be regarded with respect by the profession.

The cases reported are not of a peculiar class, but in several of them principles are established which are worthy of the attention of the profession. In *The Delaware and Raritan Canal Co.* v. *Wright*, it was decided that twenty years' adverse possession, and maintaining what would otherwise be a nuisance, will give a right to maintain it; a decision certainly somewhat at variance with the case of *Stetson* v. *Faxon* (19 Pick.) 159.) In *Am. Print Works* v. *Lawrence* (p. 248) it was held, that the *destruction* of private property for the public safety, as in case of a general conflagration, is a *taking* for public use within the meaning of the constitutional provision. In *State* v. *Spencer* (p. 196) it was held that the test of insanity in criminal cases is, whether the accused, at the commission of the crime, was conscious that he was doing what he ought not to do. In the same case, the learned Chief Justice (Hornblower) expresses himself very strongly against the practice of interrogating jurors as to

their opinions, and intimates that the practice hitherto adopted is improper. In *Grant* v. *Wood* (p. 292) it is decided that a shipper (being owner) of goods sent by a general ship, is liable for freight at all events, independent of the bill of lading, and it is immaterial whether the ownership appears on the bill of lading or not.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Archer, Luther L.	Worcester,	June 15,	Henry Chapin.
Baker, Stephen, Jr.	Ipswich,	May 14,	J. G. King.
Bassett, Edward D.	Lawrence,	June 14,	J. G. King.
Benway, Joseph	Greenwich,	" 21,	M. Lawrence.
Black, Horace	Ashburnham,	" 25,	Henry Chapin.
Bliss, George N.	Medway,	" 29,	Francis Hilliard.
Bush, Thomas B.	New Bedford,	" 3,	David Perkins.
Carr, Edwin	Lowell,	" 24,	Asa F. Lawrence.
Chase, John	Newbury,	" 17,	J. G. King.
Corey, Paris	Springfield,	" 7,	George B. Morris.
Dean, Ruel et al.	Springfield,	" 1,	George B. Morris.
Dodge, Achsat, E.	Lowell,	" 20,	Asa F. Lawrence.
Flagg, Abraham	Princeton,	" 18,	Henry Chapin.
Geer, George P. et al.	Boston,	" 18,	John M. Williams.
Gleason, Luther	Wayland,	" 24,	Asa F. Lawrence.
Hendrich, Chauncey R.	West Hampton,	" 7,	M. Lawrence.
Hills, William B. et al.	Springfield,	" 8,	George B. Morris.
Holmes, John K.	Taunton,	" 14,	David Perkins.
Lee, James	Boston,	" 19,	John M. Williams.
Lincoln, Aunes A.	Norton,	" 11,	David Perkins.
Millard, Norton W.	Otis,	" 25,	Thomas Robinson.
Newhall, Elbridge G.	Lynn,	" 19,	J. G. King.
Page, Greenleaf	Dorchester,	" 17,	Francis Hilliard.
Phelps, Edward	West Boylston,	" 1,	Henry Chapin.
Piper, Magnus	Roxbury,	" 20,	Francis Hilliard.
Pitts, Walter et al.	Cambridge,	" 28,	Asa F. Lawrence.
Plummer, Jonathan	Georgetown,	" 21,	J. G. King.
Reed, Sarah E.	Danvers,	" 15,	J. G. King.
Ropes, William H.	Bedford,	" 13,	Asa F. Lawrence
Shattuck, Calvin W.	Coleraine,	" 4,	D. W. Alvord.
Shaw, Melvin	Abington,	" 22,	Welcome Young
Shaw, Benjamin F.	Lynn,	" 3,	J. G King.
Sherburne, Geo. W. et al.	Boston,	" 11,	John M. Williams.
Slocumb, Joseph	Lawrence,	" 4,	J. G. King.
Titus, Daniel	West Cambridge,	" 3,	Asa F. Lawrence.
Underwood, Charles W.	New Bedford,	" 15,	David Perkins.
Wallace, Merriek	Ashburnham,	" 11,	Henry Chapin.
Warner, Henry W.	Greenfield,	" 1,	D. W. Alvord.
Watson, Joseph et al.	Winchendon,	" 18,	Henry Chapin.
White, Peregrine	Goshen,	" 4,	Myrom Lawrence.
Woods, Joseph	Fitchburg,	" 15,	Henry Chapin.

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ing to each of its branches; the views in every instance, as is indispensable in a law-book, being supported by a reference to cases which have arisen, and to decisions which have been made in the courts of the country. These references are clearly arranged and classified under appropriate heads, for the greatest convenience of those who may consult them.

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